UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	Docket ## X-83-04-01 & 02-3008
ARRCOM, INC.,	)	
DREXLER ENTERPRISES, INC., et. al.	)	
	)	
Respondents	)	

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1. Resource Conservation and Recovery Act - A facility eligible for interim status and which manages hazardous wastes, must operate said facility in accordance with the provisions of 40 C.F.R. Part 265 whether or not it has notified under § 3010 of the Act or filed a Part A application.

2. Resource Conservation and Recovery Act - Lessors of land upon which a RCRA governed facility is located, who have no association with management, operator or other interest in such facility held not liable for civil penalties.

3. Resource Conservation and Recovery Act - Penalty Assessment - Although the old draft penalty policy severely limited any down ward adjustment of the proposed penalty based on "ability to pay" substantial reduction in proposed penalty made here using philosophy of later final penalty policy, even though such final policy was technically not applicable.

4. Resource Conversation and Recovery Act - Interim Status - A facility which was initially granted interim status may lose such status, if the Agency, upon re-examination of the Part A application, determines that such application is deficient and the facility fails to correct such deficiencies in the time allowed therefore.

Appearances:

D. Henry Elsen, Esquire
U.S. Environmental Protection Agency
Seattle, Washington
For the Complainant

A. N. Foss
Accountant for Arrcom, Inc.,
and George Drexler, Respondents

INITIAL DECISION

This is a consolidated proceeding under Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act (42 U.S.C. 6928).[1] These proceedings were commenced by the Acting Regional Administrator, Region X, with the filing of a Complaint and Compliance Order and Notice of Right to Request a Hearing on April 27, 1983 as to the Rathdrum facility and May 10, 1983 as to the Tacoma facility. The Complaint and Compliance Order as to the Rathdrum, Idaho facility alleged, inter alia, that the facility disposed of hazardous wastes without submitting proper notification or a Part A permit application, submitting a Part A application for a storage facility without obtaining the owner's signature, and violating several facility standards applicable to hazardous waste management facilities eligible for interim status. As to the Tacoma, Washington site, the Complaint and Compliance Order alleged that the various corporate and personal entities involved were operating a hazardous waste management facility without a permit. The Complaint and Compliance Order in regard to the Tacoma site also charges the land owners, Mr. Cragle and Mr. Inman, with violations of the Act in addition to the Drexlers and the various companies and corporations which they have, over the years, formed and operated.

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[1] Pertinent provisions of Section 3008 are:

Section 3008 (a)(1): "(W)henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle (C) the Administrator may issue an order requiring compliance immediately or within a specified time...."

Section 3008 (g): "Any person who violates any requirement of this subtitle (C) shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation."

Subtitle C of RCRA is codified in Subchapter III, 42 U.S.C. 6821-6931.

The Respondents filed letters and formal pleadings to the Complaint, some without the benefit of counsel and some by counsel, all of which essentially admitted the facts but denied any culpability. Mr. Warren Bingham, the owner of the Rathdrum, Idaho property was represented by counsel and prior to the hearing in this matter entered into a separate settlement agreement with the Agency and agreed to implement an approved closure plan for the facility and was not a party to the Hearing and is not a party to this Decision. At the time of the filing of the two Complaints, two of the Drexlers were incarcerated in a prison in California for activities associated with the various businesses they operated. The nature of said offenses are not relevant to this proceeding.

A Hearing on this matter was held in Seattle, Washington on April 30, and May 1, 1985 at which Mr. George Drexler appeared with his representative, Mr. Foss, who is an accountant, and the other parties did so without counsel. Following the hearing and the availability of the transcript, briefs were filed by all attending parties. The brief filed on behalf of the Respondents were, unfortunately, not particularly helpful since they were prepared by non-attorneys and did not conform to the requirements of the regulations. To the extent the briefs filed on behalf of the Respondents provided arguments and legal viewpoints relevant to this proceeding, they were considered. To the extent they provided arguments which were not supported by the evidence of record, they were disregarded.

In preparing this Initial Decision, I have carefully considered all of the materials appearing of record and the relevant portions of the briefs submitted by the parties and any findings proposed by the parties which are inconsistent with this Decision are rejected.

One may wonder at the length of time that has ensued between the issuance of the Complaints and the holding of the Hearing. As indicated above, two of the Respondents were serving time in Federal prison when the Complaints were issued and all of their records from their various corporations were seized by the Government. The Agency made several motions to postpone these proceedings so it could try to obtain the Respondents' records from the Government and additionally take the depositions of several of the Respondents who were either incarcerated or otherwise not available. My understanding is that the Agency was, for the most part, unsuccessful in retrieving many of the records seized by the Government and this apparently is true as well for the Respondents who at the time of the Hearing indicated that, although they had turned over several truck loads of materials to the Government, following their release from prison they were only returned two or three boxes of records. The lack of records for the benefit of both the EPA and the Respondents caused some delay in this matter. The efforts on the part of EPA to obtain additional information from the Justice Department also contributed to the delay.

not true

Factual Background

The Tacoma Site - X-83-04-01-3008

Respondents, Arrcom, Inc., and Drexler Enterprises, Inc., are corporations which were responsible for the beginning of the operation of a business involving storage of used oil and solvents located at the C Street facility in Tacoma, Washington. The President of both of these corporations is Respondent, George W. Drexler. The Respondent, Terry Drexler, Inc., was a corporation doing business as Golden Penn Oil Company

and Western Pacific Vacuum Service. Respondent, Terry Drexler, was the president of all of these corporations and organizations. Terry Drexler either acting as an individual or officer of one of his several corporations orally subleased the C Street facility from his father, George Drexler, the president of Arrcom, Inc. The Respondents, Richard Cragle and Ronald Inman, are the owners of the C Street facility and the lessors thereof.

In August of 1981, the property owners, Cragle and Inman, leased a portion of a warehouse facility to Empire Refining Company, another corporation owned by George W. Drexler. The facility leased consists of a cemented or asphalted yard under which are three (3) underground storage tanks. An unused loading rack and a small shed are also located on the premises. The facility address is 1930 C Street, Tacoma, Washington, and is located in an industrial area within the city limits of Tacoma, surrounded by other industrial facilities. All of the various corporations formed by George Drexler referred to above will be hereinafter referred to as Arrcom throughout this Decision for purposes of simplicity.

Arrcom began using the Tacoma facility in August 1981 for the storage of used oil and other materials. On December 3, 1981, George Drexler advised an EPA official that the facility was used for the storage of waste oil and solvents. Alan Pickett, an employee of Arrcom and Acting Secretary of Arrcom, confirmed this in a conversation held on the same day by telephone with the same EPA official. After written requests by EPA on January 6, 1982, Arrcom submitted a Notification of Hazardous Waste Activity which listed characteristic ignitable wastes in the form of used oil and various solvents as hazardous wastes which was handled at that facility. The Notification indicated that the hazardous waste was stored, treated or disposed of at the C Street facility. A Part A permit

application was submitted by Arrcom which indicated that 30,000 gallons of spent solvents and 500,000 of used oil were estimated to be stored a the site on an annual basis in the underground storage tanks. This application stated that the start-up date for the facility was August 1, 1981 and that both the Notification and the Part A application listed George Drexler as the facility contact for the C Street operation.

The Part A application was rejected by EPA as incomplete. Numerous deadlines were set for re-submittal of the forms and providing proper and complete information. The Agency also advised Arrcom that if they were not able to provide the necessary information that they would be given the option of submitting and implementing a closure plan for the facility pursuant to 40 C.F.R. Part 265. Apparently there was some confusion within EPA as to whether or not this was a facility that would qualify for interim status which apparently it was not since it did not come into operation until August 1, 1981, well past the November 1980 statutory deadline. Subsequent to this exchange of applications and letters to and from the Agency and the Respondent, Arrcom, Arrcom sub-leased the facility to Terry Drexler and Terry Drexler, Inc., which continued to utilize the storage activities involving used oil and spent solvents. None of the individuals or entities which have operated the facility have completed the necessary application forms for either a Part A or Part B permit nor have they submitted a closure plan.

EPA, in conjunction with State officials, conducted an inspection at the facility on June 9, 1982. Terry Drexler, who apparently was sub-leasing the facility from his father, accompanied the inspectors during this visit. A sample of the oil from one of the underground tanks was taken by EPA Inspector, William Abercrombie. Subsequent to that inspec-

tion and the analysis of the samples taken, the Agency advised Terry Drexler on July 27, 1982 that all requirements under 40 C.F.R. 261.6(b) would be applicable if the waste were determined, in fact, to be hazardous.

Analysis of the samples taken was performed by Washington State Department of Ecology Laboratories and by EPA laboratories. The State analysis revealed that the waste oil flash point was below 140° F, making it a hazardous waste. Analysis at the EPA laboratory revealed the presence of several hazardous wastes including toluene, a listed hazardous waste at 1700 ppm, as well as trace amounts of ethyl benzene and methylene chloride. The sample analysis also revealed the presence of naphthalene and other solvents in the oil stored in the tank.

Since the facility did not qualify for interim status and had not made the proper submissions to enable it to be permitted completely under the Act, the operation of the facility by Arrcom and Terry Drexler constitutes the operation of a facility without a permit, in violation of the statute and the regulations promulgated pursuant thereto.

The numerous corporations created by George Drexler and his son, Terry, are, for all practical and legal purposes, inseparable from the individuals which created them and control and own all of the stock in said corporations.[2] The corporations appear to own no assets either in the form of equipment or real estate, and therefore, any finding of liability against the corporations will amount to a finding against George and Terry Drexler as the alter-egos of these corporations. Why the Drexlers went to the time and expense of forming these multitudinous corporations is unknown to the writer, but their creation appeared to have

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[2]In some cases, stock not owned by Respondents is owned by a wife or other family member.

no illegal nor nefarious motives associated therewith. The Drexlers apparently operated all of their facilities on an individual basis without regard to corporate involvement and, for the most part, apparently ignored any distinction among their various corporations for the purposes of transacting the business which is the subject of this Decision.

In regard to the Tacoma facility the Agency is arguing that the land owners, Cragle and Inman, are jointly and severally liable for any fines that would be assessed and are liable under the Act for the activities which are found to have taken place on their property in Tacoma.

In support of this notion, the Agency draws the Court's attention to several cases under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) usually referred to as Superfund. The Court has carefully reviewed the cases cited by the Agency and finds that, in fact, the Courts have found that non-negligent land owners are liable for contribution to the cost of cleaning-up the facilities involved. Language in the various decisions reviewed is not particularly helpful in that they contain little or no analysis of the rationale behind the Court's ruling that the non-negligent and non-participatory property owners were liable for paying their share of the cost of the clean-up. The Court merely cited the language of the statute which states that owners, operators, transporters, and those who arrange for the transport of hazardous substances are liable under the Act. In the case of United States v. Argent, 21 ERC 1354 (D.N.M., 1984), the Court found that the owners of land leased to operators of a silver recovery business are liable under the Act for costs incurred by the Government in responding to a spill of sodium cyanide even though the land owner was not connected

with the silver recovery business because the legislative history shows Congress intended land owner/leassors to be within the definition of owners liable under §107 of CERCLA.

wasn't only basis of argument

Although these cases are interesting, they are not, in my judgement, controlling in the case presently before me. There are several reasons why this is true. The first being, of course, the obvious one that the cases cited by the Agency to support its theory were decided under a completely different statute. The other reason being that when one examines the sanctions available to the Government under CERCLA and the purposes for which it was enacted, they are, in regard to land owners, very different from the provisions under RCRA. In the CERCLA cases the costs are recovered for clean-up and the bringing of the properties in question back to a non-hazardous state. Clearly this enterprise on behalf of the Government and/or its contractors inures to the benefit of the land owners because, absent such clean-up, the land would be, for all practical purposes, useless to him and unavailable for any commercial use. Since in the case of CERCLA, the absent and non-participatory land owner has reaped a benefit by the clean-up accomplished by the Government, it is only fair that he share in the costs involved therein. Such is clearly not the case here where the land owners, Cragle and Inman, were merely arms-length lessors of a discrete piece of real property and had nothing whatsoever to do with the operation of the business engaged in by the Drexlers. Also at no time prior to the institution of the Complaint in this matter were they advised that there was any improper activity being conducted by the Drexlers on their property. The record indicates that this facility has historically been used for the storage of oil many years prior to the enactment of RCRA and that there was nothing to alert

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the land owners to the fact that some how the activities being conducted thereon by the Drexlers was in any way different from what previous tenants had been doing in the past.

In this regard, I am more persuaded by the language of the Court in Amoco Oil Company v. EPA, 543 F.2d. 270 (D.C. Cir., 1976), which held that the Agency acted improperly when it promulgated regulations under the Clean Air Act which attempted to make refiners of gasoline responsible for illegal activities committed by tenants of retail gasoline service stations. The Court held that the mere fact that a refiner may have leased certain real estate and equipment to an individual who sells his product but does not, without more, furnish any logical or legal basis for imposing blanket responsibility upon the owner for offenses or illegal acts committed by the lessee of the premises. In the absence of any indication of a specific intent on the part of Congress to create a "new tort, the traditional common law rules of vicarious liability must apply." In the Amoco case, supra, the Court refused to hold the refiner liable for the illegal acts of its lessee even though such lessees were purchasing and selling products manufactured and distributed by the refiner. That relationship is certainly a lot closer and of a more mutually beneficial nature than that which exists between the Drexlers and the land owners in this case who had no interest, knowledge or association with the used oil business conducted on the property.

Therefore, I am of the opinion that, under the facts in this case, the notion of vicarious liability as to the non-negligent and non-paticipatory land owners in this case is not applicable and that I herewith find that the lessors, Craigle and Inman, are not liable for any civil penalty, nor are they subject to any Order which might issue under

this case. There is, of course, nothing to prevent the Agency from causing the facility to be cleaned up and then attempting to obtain contribution from the land owners under CERCLA. They may not, however, impose a civil penalty under RCRA in these circumstances.

The Drexlers, as to the Tacoma facility, argued several defenses. One of which is that they did not know that the materials they were processing at the facility constituted hazardous wastes. And secondly, that they are not liable for any civil penalty under the Act because of an agreement they entered into with the Department of Justice in association with their criminal conviction and subsequent incarceration for activities un-related to this matter.

As to the first defense, it may well be true that, initially the Drexlers were not aware that what they were doing constituted the handling of waste materials. However, they admitted on several occasions that they were handling certain solvents and other highly flamable materials and were apparently freely mixing them with the waste oil which they had collected from other sources. Under the circumstances, it is clear that the Drexlers, George and Terry, are liable under the Act for the operation of a hazardous waste facility without first obtaining a permit.

As to the second defense, that is the agreement they entered into with the Department of Justice prior to entering a guilty plea in a criminal matter, the record is clear that nothing contained in that agreement has any bearing whatsoever on the matter currently before me. Paragraph 5 of the agreement entered into between the Drexlers and the Department of Justice states that "this agreement is in disposition of all Federal criminal charges arising from the defendants George and Terry Drexler's businesses and in further consideration of the defendants

guilty pleas the Government agrees there will be no additional Federal charges filed on events which occurred on or before November 24, 1982 in connection with those businesses." Although the language quoted is not without ambiguity, it is clear that it was the intent of the Government and of the Drexlers that the agreement that they signed only applied to Federal criminal charges arising from their businesses and did not, and in my judgement could not, have constituted an absolute granting of immunity to the Drexlers by the Government for any and all unrelated criminal and civil matters that the Drexlers might have additionally been guilty of. I, therefore, am of the opinion that the above-mentioned agreement does not insulate the Drexlers from liability relating to civil penalties asociated with the operation of the Tacoma or Rathdrum facilities. This interpretation is further bolstered by a letter dated October 19, 1984 from Stephen Schroeder, Assistant U.S. Attorney in Seattle, to Ms. Barbara Lither, then the EPA attorney in charge of this matter, which stated that the "parties to the attached agreement neither contemplated nor intended to dispose of any civil proceedings which might be conducted. Indeed, everyone assumed that civil tax consequences would ensue from the criminal judgement."

The Rathdrum Site - X-83-04-02-3008

This Complaint involves once again George Drexler and his corporations, Terry Drexler and W. A. (Alan) Pickett, which owned and operated a hazardous waste management storage and disposal facility in Rathdrum, Idaho. Since the facility commenced operation prior to November 1980, it was eligible for interim status. The facility did notify EPA of its existence under the Act and filed a Part A application which was signed

by Mr. Pickett as owner when, in fact, he was not the owner. At the time that the Part A application was filed with the Agency, EPA was unaware of the problems associated with Mr. Pickett signing and it assumed the facility was enjoying interim status. Upon being advised by Mr. Warren Bingham, one of the Respondents and the owner of the property, that he had not authorized Mr. Pickett to sign the application, the Complainant requested that the Respondent submit a corrected Part A application or submit a closure plan. Respondents subsequently stopped operations but have neither re-submitted the Part A application, nor submitted a closure plan. Dispite that discrepancy, the Agency apparently still considers the facility to have obtained interim status for the purposes set forth in the application, that being storers and treators of hazardous wastes.

The Complaint states that the Respondents spilled and/or disposed of hazardous wastes or hazardous waste constituents into the soil surrounding some of the buildings and tanks on the facility and such release constitutes disposal. Since the facility had not qualified for interim status for disposal it is therefore in violation of § 3005 of the Act. The Complaint then goes on to list approximately eleven (11) discrepancies which the inspections and investigations of the facility disclosed and for which the Complaint proposes to assess penalties. The Complaint initially proposed a civil penalty in the amount of $75,925.00 which was subsequently reduced to $73,500.00.

As I understand the Complainant's position, they view the Respondents in this case as operating a facility which enjoys interim status despite the fact that they have alleged in the Complaint that the Part A application originally filed was defective inasmuch as it listed W. A. Pickett as the owner of the facility, when, in fact, the premises were owned by

Mr. Bingham. This situation is slightly perplexing in that, on the one hand, the Agency recognizes the facility as having been granted interim status and, on the other hand, cites them for a violation of the regulations for filing a defective and insufficient Part A application. The Agency advised the Respondents that they must re-submit their Part A application properly filled in, an act which was never accomplished, for a variety of reasons.

Additionally, during late 1981 and early 1982, the Agency advised the operators of the Rathdrum facility that they must revise their Part A application since it failed to list certain hazardous wastes that the Agency had reason to believe they were handling. Several deadlines were set for this re-submission. The record indicates that none of these deadlines were met, or if some response was made, it was deemed by the Agency to be unacceptable. The question arises as to whether or not this facility had interim status.

The Agency generally has taken the position that a facility may have interim status as to waste "X", but not as to waste "Y". Or that it has interim status as a storer of waste, but not as a disposer. That language has always troubled me. It seems to me that a facility either has interim status or it does not. If one equates the term interim status as being synonymous with having a temporary or probationary permit, pending the issuance of a full or true permit, the language is understandable. Therefore, if one is handling a waste which he failed to identify in his Part A application, he is operating without a permit as to that waste and is, therefore, violating the Act.

In the instant case, the Agency seems to take the position that the facility had interim status as to the waste listed as D001, or ignitable

waste, but not as to the other wastes that it handled. However, the Part A application and the supplement later filed, were both signed by Alan Pickett as owner, a defect which the Agency considers as rendering the application unacceptable. Therefore, it would seem that the Rathdrum facility was operating without interim status for any waste, including D001. This conclusion is bolstered by the language of the regulations. 40 C.F.R. § 270.70(b) provides that:

> "Failure to qualify for interim status. If EPA has reason to believe upon examination of a Part A application that it fails to meet the requirements of § 270.13, it shall notify the owner or operator in writing of the apparent deficiency. Such notice shall specify the grounds for EPA's belief that the application is deficient. The owner or operator shall have 30 days from receipt to respond to such a notification and to explain or cure the alleged deficiency in his Part A application. If, after such notification and opportunity for response, EPA determines that the application is deficient it may take appropriate enforcement action."

The footnote to this section advises that:

> "When EPA determines on examination or reexamination of a Part A application that it fails to meet the standards of these regulations, it may notify the owner or operator that the application is deficient and that the owner or operator is therefore not entitled to interim status. The owner or operator will then be subject to EPA enforcement for operating without a permit."

The scenario depicted in the regulations is exactly what happened in this case. The Respondents never filed an amended application which the Agency found to be acceptable. (See the testimony of Linda Dawson, Tr. 83-89.)

The lack of interim status does not, however, relieve a facility of the duty to comply with the provision of Part 265 of the regulations. This is clear from a reading of § 265.1 which states that the regulations apply to those who have been granted interim status as well as those who failed to notify under § 3010 of the Act or to file an acceptable Part A application.

For all practicable purposes, the result of this analysis is that a facility must abide by the provisions of Part 265 of the regulations whether they enjoy interim status or not. The only difference is that those who do not enjoy such status are also guilty of operating without a permit. In this case, the Agency proposed a substantial penalty for disposing of waste without a permit. Assuming my analysis is valid, a similiar penalty could have been proposed for all activies engaged in at the facility.

Arrcom used the facility for the storage and disposal of used oil, spent solvents and other substances prior to the treatment of these materials for resale as fuel. On December 14, 1979, Arrcom sold the facility along with all equipment, stock and vehicles to Mr. Bingham. Mr. Bingham leased the facility back to Arrcom, which continued to use the property as before.

Despite representations to the contrary by Arrcom personnel, the facility was accepting and treating hazardous wastes other than ignitable waste oil (D001) at the facility. These wastes were identified as spent solvents in the F001 series. (Complainant Exhibits No. 40 and 48, Idaho.) Mr. Alan Pickett, secretary of Arrcom, belatedly admitted that the facility was accepting spent solvents and mixing them with the waste oil.

Mr. Bingham, in January 1982, evicted Arrcom from the premises for non-payment of rent. On July 20, 1982, the Agency conducted an inspection and sampling effort at the Rathdrum facility. At the time of this inspection, the facility was not in operation and appeared to have been abandoned since the eviction. The EPA inspector determined that prior to the abandonment, oil had been spilt throughout the location and the tanks

containing oil were very visibly leaking onto the ground. This oil on the ground was present despite the fact that Arrcom had changed the dirt and gravel at the facility before it began operations there. The inspection revealed no evidence of any record keeping of any kind at the facility. There was no complete or continuous fence surrounding the site and the tanks were in general disrepair. No safety equipment or fire extinguishers or telephones were present at the facility. One can only speculate as to the presence of these items when the facility was in operation by Arrcom, but no evidence was forthcoming that the required equipment was, at any time, present. As indicated above, the records of the Respondents, George and Terry Drexler, were confiscated by the Government in connection with their criminal problems and after the Agency finally gained access to those records, a diligent search thereof revealed none of the records required by the regulations.

The inspector took a variety of samples from several locations on the property and subsequent analysis of those samples revealed significant concentrations of trichloroethane, ethyl-benzene, and methylene chloride, toluene and trace amounts of other listed hazardous wastes. A second and more extensive sampling and analysis effort was conducted June 6 through June 8, 1983 at the Rathdrum facility. A sample was taken from a large storage tank on the north end of the facility used for the initial storing and mixing of used oils and solvents. Analysis of that sample revealed the presence of ethyl benzene at 5,000 ppb, toluene at 6200 ppb, and xylene at 17,600 ppb. Samples from other tanks on the facility also revealed the presence of solvents and other listed hazardous wastes in high concentrations. Soil samples taken near the large storage tank also

revealed the presence of a variety of hazardous solvents in significant concentrations. The concentration of the solvents found in the soil samples was substantially higher than that found in the storage tanks.

The Agency considers such spillage to constitute disposal, a conclusion supported by the language of the regulations, and inasmuch as the facility is located over a sole source acquifer, the Agency considered such illegal operation to constitute a serious threat to the public health and environment which resulted in emergency removal action under Superfund.

The Respondents in defense of their activities at the Rathdrum facility testified that they had never used the tank from which the sample was taken and that primarily they used rail tankers to heat the oil and that these tankers sat on a concrete pad which was bermed in on all sides and had an 8,000 gallon drain tank located under ground of the center of the concrete pad. Their contention being that if anything had leaked from their tank it would have been captured in the underground storage tank which is placed there for that purpose. Mr. Drexler also testified that he completely bermed the other storage tank and that to his knowledge no oil that he had processed on the facility ever escaped to the bare ground. This facility had been used for many years as a oil refining and treatment plant as well as for other chemical activities related to the petroleum industry. Mr. Drexler's position is that any oil or solvents found on the ground by the EPA inspectors was placed there by previous owners and operators of the facility and that he contributed nothing to the hazardous wastes that were detected by the Agency sample and analysis program.

The Agency apparently takes the position that it is immaterial whether or not the Respondents placed the hazardous waste on the property

since as owners and operators they are responsible for any conditions that exist thereon and that the Agency can only be guided by what its inspections and sampling analysis endeavors produce, since they did not inspect the premises until after they were abandoned by the Drexlers due to their forced eviction. Given the record in this case, one must recognize that the credibility of the Drexlers must be viewed with some suspicion. In addition, the Agency provided for the record, copies of manifests which indicated that the Drexlers were, in fact, handling hazardous wastes at the facility in the form of spent solvents and, there fore, their protestations to the contrary are not worthy of significant weight. In this regard, the Drexlers stated that the paint thinner which they recieved on their property was taken there by one of their truck drivers without knowing of its nature and that except for that one instance, they had never received anything else other than used oil at the Rathdrum facility. The Respondents further argue that Arrcom had been locked out of the Rathdrum site since December 1981 and that the owner since 1979, Mr. Warren Bingham, would not allow anyone associated with Arrcom on the premises. The Respondents argue that this lockout was so sudden that there was no opportunity to empty out the tanks and police the area and Arrcom had no idea what, if any, activities occurred on the premises since January 1982. Mr. Drexler also argues that he never authorized anyone in his employ to apply for a Part A permit for the facilities but, in Court, upon cross-examination, he admitted that Mr. Alan Pickett had the apparent authority to act in Mr. Drexler's stead to accomplish whatever business activities were necessary in order to keep the operation running. Apparently Mr. George Drexler, the President of Arrcom, did not spend much time on the facilities in question since he

was devoting most of his time and efforts to running the facilities located in the State of Washington and relied on family members and Mr. Pickett to take care of the operation of the Rathdrum facility.

As pointed above, any facility which is eligible for interim status is governed by the provisions of 40 C.F.R. Part 265, and inasmuch as the facility never filed a closure plan the activities accomplished thereon were subject to the provisions of the Act even though Mr. Drexler and his various corporations were no longer on the premises.

Discussion and Conclusion

Mr. George Drexler, the patriarch of the Drexler clan, has apparently been in the oil recovery business for approximately 38 years and his sons, Tommy and Terry, followed in their father's footsteps and became involved in this industry as well. The Drexlers, by their own admission, are relatively un-educated and certainly unsophisticated in the role that the Government plays in the industry which they have chosen. My analysis of the record indicates that the Drexlers, in good faith, felt they were rendering a beneficial environmental service by re-refining used oil and placing it back in the economy, a service which, in their judgement, prevented such used oil from finding its way into the waters and land of the Country. Although I have no reason to disbelieve the Drexlers position on this issue, it is quite clear that the provisions of RCRA caught the Drexlers unaware and their continued operation, in the face of the rather complex regulations promulgated by the Agency, ultimately placed them in the position of violating many of the provisions of such regulations.

From this record, it is clear that as to the Tacoma facility they operated a hazardous waste facility without obtaining interim status therefore. As to the Rathdrum facility they were either operating without interim status as to disposal and the handling of certain spent solvents or, depending on which legal philosophy you want to adopt, they were operating the Rathdrum facility without interim status as to any pollutants or hazardous wastes. The Drexlers, through their various corporations, in my judgement, made a good faith effort to operate the Rathdrum facility in a way that they felt would not harm the environment. However, they did not appreciate the impact of the regulations on the those portions of the Rathdrum facility which they did not actively operate. They apparently took the position that they were not responsible for the conditions existing on the premises when they purchased it and that as long as they operated those discrete portions in a safe and business-like manner, that they would not violate any environmental regulations. Unfortunately, history in this case has demonstrated the incorrectness of that posture.

The decision in this case is further complicated by the fact that none of the Respondents appeared by counsel at the Hearing and, therefore, their presentation and their subsequent filing of post-hearing briefs was, to that extent, deficient, although Mr. Foss, the accountant who appeared on behalf of Mr. George Drexler, did a commendable job considering his lack of expertise and training in the area under discussion. As indicated above, the factual investigation of this case was further complicated by the fact that the great bulk of Respondent's records were previously seized by the Federal government and, if one believes the Respondent's testimony, large portions of those records were never returned to them

and thus they could not bring forth evidence to support their allegation that they have in fact filed all the necessary documents that the law requires and had on file the various management documents which the regulations also require. Given the rather lax way in which the Rathdrum facility was apparently operated by either the Drexlers or Mr. Pickett, I find it difficult to believe that the Respondents had prepared all the rather voluminous and technically difficult documents which the regulations envision that a facility such as theirs have on file. I, therefore based on this record, find that the allegations of the Complaint having to do with the failure of the Respondents to have certain equipment and documentation on file and present at the Rathdrum facility must be sustained.

The question of the amount of the penalty to be assessed is now ripe for discussion. EPA's Exhibit No. 42, Idaho, and No. 25, Tacoma, are the penalty calculation worksheets which the Agency witness used to come up with the fines and penalties proposed in this case. It should be noted that the amounts set forth in the penalty calculation sheet differ substantially from those which are set forth in the Complaint. Although the total amount of the proposed fine has been reduced from $75,000.00 to $73,350.00, the individual differences, on a count-by-count basis, differ widely from that set forth in the Complaint. For example, the Compliant proposes a penalty of $22,500.00 for the failure to have the signature on the Part A application and the revised calculation proposes a penalty of $850.00 for this offense. The violation as to the failure to have adequate security on the premises was increased from $7,500.00 to $22,500.00, and so on down the list. The proposed penalty as to the Tacoma site, that is, operating without a permit, was reduced from $22,500.00 to

$13,500.00. Apparently, this reduction had to do with the potential risk associated with this facility since the tanks in question were all underground and apparently intact and, therefore, the Agency took the position that the likelihood of release to the environment of these materials was rather remote.

If one believes the testimony of the Respondents, and in this instance I have little doubt as to its validity, they are for all practical purposes judgement-proof. All the corporations formed by the Drexlers have been either dissolved or declared bankrupt and in addition to having no assets the Drexlers are facing a $10,000.00 fine from the Federal Government. Mr. George Drexler and his wife are living off the proceeds of their social security check and are without additional income.

The newest version of the Agency's penalty policy for RCRA, discusses what the Agency should do in the case of the inability of the Respondent to pay a proposed penalty and the effect that the paying of such penalty would have on his ability to continue in business. The draft penalty policy, which the Agency used in this case, also discusses the question of whether or not a reduction of the proposed penalty should be made in view of the purported inability of the Respondents to either pay the fine or continue in business. The draft policy states that no reduction should be made unless it is apparent from the record that the Respondents would be forced to close their business in the face of payment of the proposed penalty and further that the closing of the business would, either: (1) have a serious economic effect on the economy of the area surrounding the facility; or (2) that the continued operation of the facility is deemed by the Agency to provide a worthwhile environmental benefit and the closing of which would result in potential damage to the

environment. All of these considerations are inapplicable here since all of the businesses that the Drexlers had previously run are shut down and at best they employed only a few persons and therefore their impact on the economy would certainly be incapable of being measured. Likewise, the continued operation of these facilities would, in my judgement given the nature in which they were operated, provide little or no benefit to the general environment.

Under these circumstances, one is faced with the dilemma of imposing a substantial penalty upon individuals who are not only judgement proof but whose potential future earnings seem to be already spoken for by other elements of the Federal Government.

The new, and hopefully final, RCRA Civil Penalty Policy which was issued on May 8, 1984 takes a little more realistic and liberal view as to the downward adjustment of the proposed penalty based on the ability of a violator to pay. This new Policy states that: "The Agency generally will not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability of a violator to pay a penalty." The Penalty Policy goes on to say that: "when it is determined that a violator can not afford the penalty prescribed by this policy, or the payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out any remedial measures which the Agency deems to be more important than the deterrence effect of the penalty, in other words, payment of the penalty would preclude proper closure/post-closure", the following options may be considered. Then the policy lists three options such as a delayed payment schedule, installment plan or a straight penalty reduction as a last recourse.

As to the Rathdrum facility, the record indicates that the Agency has already commenced clean-up of that location and has obtained the pledge of the owner, Mr. Bingham, to help in that endeavor. The Drexlers are apparently in no position to assist in that effort. As to the Tacoma facility, it apparently imposes no immediate environmental risk and closure thereof would probably constitute the pumping out of underground storage tanks and a rinsing thereof, all of which would probably not cost a great deal of money. In any event, it is unlikely that the Drexlers are in a position to effectuate that clean-up, although the record in that regard is unclear since a discussion of the costs incident to such a clean-up were never presented.

Although the draft policy which was utilized by the Agency to calculate the proposed penalties in this case is the one which is apparently applicable to this case, one can not ignore the Final Agency Penalty Policy which was promulgated subsequent to the issuance of the two Complaints in this case but prior to the Hearing and this Decision. It occurs to me that under the strange and unique circumstances present here, the language and spirit of the Final Penalty Policy, to the extent it is deemed appropriate, should apply.

My decision as to the Respondents, Rich Cragle and Ron Inman, owners of the C Street property in Tacoma, has already been set forth above. It is true, as the Agency points out in its brief, that the congressional discussion associated with this Bill indicates that it was Congress' intent to impose liability on owners who are not also the operators of RCRA facilities. I do not believe, however, that it intended the result herein urged by the Agency. It is quite easy to conceive a situation where a parcel of real estate is owned by an individual who enters into a

long-term lease with a corporation who builds a substantial RCRA facility and in turn then hires a third corporation to operate the facility on its behalf. In that instance, it would seem to me that the language urged by the Agency would make both the primary lessee of the premises who owned and built the facility in question, as well as the corporation which it hired to operate the facility would both be liable under RCRA, but that absent some unusual circumstance the owner of the bare real estate would not be liable under RCRA for penalties such as proposed here. Agency policy apparently requires the signature of the owner of the facility on the Part A and B applications as a means of notifying him that he is in some way liable under RCRA for what ultimately might happen on his property. Just how the signing of an application for a Part A or Part B permit somehow advises a land owner of the potential for vicarious liability certainly escapes me. In any event, I find no reason to alter my decision that the land owners, Cragle and Inman, are not liable for the payment of any civil penalty in these proceedings.

In accordance with the above discussion, I am of the opinion that a civil penalty as to the Tacoma facility in the amount of $3,000.00 should be assessed against Arrcom, Inc., Drexler Enterprises, Inc., George Drexler, Terry Drexler, Inc., and Terry Drexler as an individual, jointly and severally.

As to the Rathdrum facility, under the circumstances in this case I find that a civil penalty in the amount of $4,500.00 is appropriate against Arrcom, Inc., Drexler Enterprises, Inc., and George W. Drexler and Thomas Drexler, individually, with joint and several liability among these corporate and individual Respondents. As to Respondent, W. A. (Alan) Pickett, his involvement in this matter is unclear and as indicated

in the record he did not appear at the Hearing either in person or through counsel. Apparently, Mr. Pickett was the former owner of the Rathdrum facility and sold it to the Drexlers in the 70s and continued to function as an employee of the operators of the facility up until the time the Drexlers and their corporation were evicted from the premises by Mr. Bingham. The record is not clear as to exactly what the relationship was between Mr. Pickett and the Drexlers although there was testimony to the effect that he had some form of employment contract with the Drexlers following his sale of the facility to them. A copy of this employment contract was not available for the record and consequently no one knows what it contained. Mr. George Drexler testified that, as to Arrcom corporation, Mr. Pickett held no office but was rather an employee. There is testimony that suggests that Drexler Enterprises, one of George Drexler's other corporations, which was in some fashion dissolved by the IRS, Mr. Pickett was the secretary of that corporation and that he apparently felt that he had some authority to function as an officer in regard to Arrcom corporation, when in fact he held no office with said corporation. It is true that Mr. Pickett signed the Part A application both as operator and owner of Arrcom, Inc. but apparently such signature on behalf of Arrcom was just as improper as his signature as that of the owner of the facility. Given the rather imprecise testimony of Mr. George Drexler relative to his association with Mr. Pickett and Mr. Pickett's authority and position with Arrcom, Inc., it is difficult to determine whether or not Mr. Pickett should be assessed a penalty in this matter as one of the operators of the facility in question at the Rathdrum site. He apparently had wide latitude to operate the Rathdrum facility on the behalf of the Drexlers and their corporations and inas-

much as he signed the applications in two capacities, it occurs to me that he should be included as one of the joint and severally liable Respondents in this matter. I am, therefore, of the opinion that in addition to the Drexlers and their corporations, Mr. Pickett should also be jointly and severally liable for the penalty proposed to be assessed herein as to the Rathdrum facility.

ORDER[3]

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928, the following Order is entered against Respondents, Arrcom, Inc., Drexler Enterprises, Inc., George W. Drexler and Terry Drexler:

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[3]The Court has carefully read the novel arguments put forth by the Complainant as to the Court's power and authority to alter the original Order issued by the Agency as part of its Complaint. (See pp. 48-51 of Complainant's initial post-hearing brief.) The Agency's argument, in this regard suggests that an ALJ has no authority to alter the Compliance Order associated with a Complaint issued by the Agency on the theory that such Orders are "executive commands and do not constitute adjudicative authority by E.P.A." The Complainant further points out that 40 C.F.R. Part 22 does not address the Compliance Order or control the disposition of such an Order in proceedings such as this. These arguments are rejected.

40 C.F.R. § 22.27 clearly directs the ALJ to issue an Initial Decision which contains, inter alia, a civil penalty and a proposed Final Order. Common sense dictates that a Compliance Order must be consistent with the factual and legal findings of the Court. If portions of the Compliant are dismissed or no violation is found, it would be absurd to leave intact those portions of the Compliance Order dealing with those issues. Conversely, additional facts developed at the Hearing may require some supplement to the original compliance order to assure that all violations and environmental hazards are addressed and remedied.

The Court perceives the fine hand of the innovative and skillful legal staff in Region X in this matter. Although novel and inventive legal propositions are encouraged by the Court, in this instance, they are not accepted.

1. (a) As to the Tacoma site, a civil penalty of $3,000.00 is assessed against Respondents for violations of the Solid Waste Disposal Act found herein.

(b) As to the Rathdrum site, a civil penalty of $4,500.00 is assessed against Respondents and Alan Pickett for violations of the Solid Waste Disposal Act found herein.

(c) Payment of the penalty assessed herein shall be made by forwarding a cashier's check or certified check payable to the United States of America, and mailed to:

EPA - Region X
(Regional Hearing Clerk)
Post Office Box 360903M
Pittsburgh, PA 15251

in the full amount within sixty (60) days after service of the Final Order upon Respondent, unless upon application by Respondent prior thereto, the Regional Administrator approves a delayed payment schedule, or an installment payment plan with interest.[4]

Order as to the Tacoma Site

2. Respondents or companies owned and/or operated by the Respondents shall not accept at this facility any hazardous waste for disposal. Furthermore, Respondents and/or said companies shall not accept at this facility any hazardous waste for storage or treatment unless

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[4]Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this Decision on his own motion, the Decision shall become the Final Order of the Administrator. See 40 C.F.R. § 22.27(c).

said storage or treatment preceeds the use, reuse, recycling or reclamation of the hazardous waste and such hazardous waste is neither a sludge nor a hazardous waste listed in Subpart D of 40 C.F.R. 261 until such time as a permit is issued by EPA pursuant to 40 C.F.R. 122 (recodified on April 1, 1983 as 40 C.F.R. 270) and 124 for this facility.

3. Respondents shall submit an approvable closure plan for this facility in accordance with 40 C.F.R. 265, Subpart G within thirty (30) days of receipt of this Order. Closure shall commence upon EPA approval of the plan and shall be accomplished in accordance with 40 C.F.R. 265, Subparts G and J as expeditiously as possible but in no event later than one hundred and eighty (180) days from EPA's approval.

Order as to the Rathdrum Site

4. Inasmuch as the above-named Respondents are currently barred from any access to this facility and further since the Agency has entered into a separate agreement with the landowner, Mr. Bingham, as to the future disposition of this site, no Compliance Order as to this facility will be issued by the undersigned.

Thomas B. Yost
Administrative Law Judge

DATED: October 21, 1985

APPENDIX A

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
ARRCOM, INC., DREXLER ENTERPRISES, INC., et al.,	)	RCRA (3008) Appeal No. 86-6
	)	
Respondents.	)	
	)	
Docket Nos. X83-04-01-3008 & X83-04-02-3008	)	
	)	

5

FINAL DECISION

Introduction.

This is a proceeding against the owners and operators of commercial property in Tacoma, Washington, who have been charged with maintaining a hazardous waste management facility without complying with Section 3005 of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. 6925, and 40 CFR Part 265, Subparts A and B, and Section 270.1. EPA Region X filed a Complaint and Compliance Order on May 10, 1983.[1/] It filed a First Amended Complaint and Compliance Order on April 3, 1985. The Regional Administrator charged the respondents with maintaining a facility at 1930 C Street in Tacoma, Washington, for the storage of waste oil, used oil, spent

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1/ This is a consolidated proceeding also involving a complaint filed against a facility in Rathdrum, Idaho on April 27, 1983. No appeal was taken from that decision.

solvents and listed hazardous wastes without obtaining a RCRA permit. The Amended Complaint assessed a civil penalty of $13,500 and ordered closure of the facility.[2/]

A hearing was held April 30, 1985. Administrative Law Judge Yost issued a decision on October 21, 1985, ruling that the operators of the facility were liable for civil penalties for failing to obtain a RCRA permit and that they were also liable to perform closure activities. However, Judge Yost ruled that the owners of the facility did not have a duty under RCRA to comply with hazardous waste permitting requirements because they had no involvement in the operation of the business. Judge Yost held that the owners were not liable either for civil penalties or for ensuring that appropriate closure procedures were followed.

The Region has appealed,[3/] taking the position that the owners/lessors of the facility shared joint and several liability with the operators of the facility for RCRA violations. The Region has further contended that the Administrative Law Judge erred in revising and reissuing the Regional Administrator's compliance order, rather than issuing a declaratory decision

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2/ In its Amended Complaint, the Regional Administrator reduced the civil penalty from $22,000 to $13,500 in light of EPA's draft RCRA Civil Penalty Policy, the final version of which was issued May 8, 1984. Judge Yost further reduced the penalty to $3,000. The Amended Complaint also added Ronald Inman as a respondent and deleted David Drexler.

3/ The Region filed its appeal November 21, 1985.

facility for the storage of used oil and solvents. Empire subsequently sublet the facility to one or more of the business enterprises conducted by Terry Drexler. For simplicity, the Administrative Law Judge referred to all of George Drexler's corporate entities as Arrcom, Inc. and I will do the same. 5/

Arrcom began using the C Street facility to store used oil and other material, including spent solvents, in August 1981. The storage on the premises of spent solvents that are listed hazardous wastes caused the facility to be subject to the reporting and permitting requirements of RCRA. Section 3010 of RCRA, 42 U.S.C. § 6930, obligates persons handling hazardous waste to notify EPA of their activities no later than 90 days after the waste is first classified as hazardous. Section 3005(a) of the statute, 42 U.S.C. §6925(a), requires a federal permit for the treatment, storage or disposal of hazardous waste. The statute requires EPA to promulgate regulations implementing its requirements, identifying and defining hazardous wastes by particular substances or characteristics, 6/ and establishing standards for hazardous waste storage, treatment and disposal facilities. 7/ RCRA Section 3008, 42 U.S.C. § 6928, authorizes EPA to seek civil penalties for its violation and to require compliance.

5/ The Drexlers argued during the proceeding below that some of these business entities lacked responsibility for the activities of the others. However, the Administrative Law Judge ruled against them, and these matters have not been raised on appeal.

6/ 42 U.S.C. § 6921(b). EPA has promulgated such regulations at 40 CFR § 261.1-33.

7/ 42 U.S.C. §§ 6922, 6923, 6924

On December 3, 1981, George Drexler informed Linda Dawson, an EPA employee, that the property was being used for the storage of used oil and solvents. In response, EPA requested that Arrcom submit a Notification of Hazardous Waste Activity. Arrcom's Notification was received by EPA on January 6, 1982. It stated that the facility handled used oil and organic spent solvents. Arrcom also submitted a Part A application for a hazardous waste permit, which was received by EPA on the same date. However, the Part A application was rejected by EPA as incomplete. In a letter to Arrcom dated January 11, 1982, EPA identified the deficiencies in the form and requested that the completed form be returned to the Agency. Among other deficiencies, the form had not been signed by the owner of the facility.

Subsequent to the exchange of correspondence between EPA and Arrcom, Arrcom sublet the facility to Terry Drexler and Terry Drexler, Inc., who thereafter continued use of the premises for the storage of used oil and spent solvents. According to EPA records, EPA has not received a completed Part A or Part B application form for a permit for the facility at 1930 C Street nor has it received a closure plan for the facility.

On June 9 and July 15, 1982, the Washington Department of Ecology and EPA jointly conducted an inspection of the 1930 C Street facility and verified the presence of several chemicals listed as hazardous waste. Thereafter, Region X initiated this enforcement proceeding, charging respondents with operating a hazardous waste facility without a Part B permit as required

by Section 3005(a) of the Act and 40 CFR 122.22(b)[recodified on April 1, 1983 at 40 CFR 270.10(f)].[8/] The accompanying Compliance Order provided that respondents shall not accept hazardous waste for disposal at the C Street facility; that respondents shall not accept hazardous waste for storage or treatment at the facility until EPA has issued a permit for the facility; and that respondents shall submit a closure plan under 40 CFR Subpart G within 30 days of the receipt of the order.

Discussion.

a) Duty of Facility Owner to Comply With RCRA

In his Initial Decision of October 21, 1985, Judge Yost ruled that the operators of the facility had violated RCRA and that they were liable to perform appropriate closure activities; however, Judge Yost determined that the owners of the facility, Cragle and Inman, had not violated RCRA because they were "arms-length" lessors with no involvement in the operation of the business. It is my judgment that RCRA does impose liability on Messrs. Cragle and Inman as owners of a non-complying hazardous waste facility. Accordingly, I reverse the decision below to the extent that it is inconsistent with that conclusion.

8/ Since the facility became operational after November 19, 1980, it was not entitled to "interim status." RCRA permits hazardous waste facilities that were in existence prior to November 19, 1980, to operate on an interim status pending the issuance of a RCRA permit.

RCRA was enacted to provide comprehensive federal regulation of hazardous wastes from generation to disposal. United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984). Congress intended the statute to have a broad reach. The Preamble to the Act recognized that inadequate controls of the management of hazardous waste may subject the public and the environment to unwarranted risks. 42 U.S.C. 6901(b)(5). Congress clearly intended to hold both owners and operators of hazardous waste management facilities responsible for compliance with RCRA requirements. As H.R. Rep. No. 94-1491 expressly stated:

> [it] is the intent of the Committee that responsibility for complying with the regulations pertaining to hazardous waste facilities rest equally with owners and operators of hazardous waste treatment, storage or disposal sites and facilities where the owner is not the operator. H.R. Rep. No. 94-1491, 94th Cong. 2d Sess. 28, 1976 U.S. Code Cong. & Admin. News 6266.

The express language of RCRA reflects this Congressional intent to impose RCRA requirements on both owners and operators of facilities. Section 3004 of RCRA directs the EPA Administrator to promulgate regulations "applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste . . . ." 42 U.S.C. § 6924 (emphasis added). It authorizes the Administrator to establish specific regulatory requirements relating to "ownership." 42 U.S.C. § 6925. Section 3005 of RCRA provides, without qualification, that each person owning or operating a facility shall be required to

obtain a RCRA permit. 42 U.S.C. § 6925. Permitting the owners of a facility used for hazardous waste storage to avoid responsibility for the activities conducted there would be contrary to the express intent of Congress and would limit the effectiveness of the statute.

RCRA does not link the duty to obtain a RCRA permit to the extent of the owner's knowledge or control of the facility. In contrast, Congress expressly limited the responsibilities of non-participating owners under another RCRA provision, Section 3013, which authorizes the Administrator to require a facility owner or operator to conduct certain monitoring, testing, analysis and reporting. Specifically, section 3013(b) provides that the Administrator may require the performance of such duties by a previous owner or operator if the Administrator finds that the current owner could not be reasonably expected to have actual knowledge of the presence of hazardous waste at the site. Congress could have used similar language in section 3005 to shield non-participating owners from RCRA's permit requirements had it so intended.

EPA gave effect to the intent of Congress when it promulgated regulations to implement RCRA. In its Preamble to the May 19, 1980 Federal Register Notice issuing regulations to implement RCRA, the Agency stated that:

> The Agency's first priority is to protect human health and the environment. Thus, where there has been a default on any of the regulatory provisions, the Agency will attempt to gain compliance as quickly as possible. In so doing, the Agency may bring

> enforcement action against either the owner or operator or both. EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements . . . . Hazardous Waste and Consolidated Permit Regulations, 45 Fed. Reg. 33169 (1980).

EPA explained its reasons at length in the Preamble. It noted that:

> [s]ome facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their property. The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility. Therefore, to ensure their knowledge, the Agency will require owners to co-sign the permit application and any final permit for the facility. 45 Fed. Reg. 33169 (1980).

Congress took a similar approach under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq., holding non-participating property owners liable for contributing to the cost of cleanup of hazardous waste sites. The Regional Administrator has cited several federal court decisions construing CERCLA as lending support to his interpretation of RCRA. See, e.g., United States v. Argent, 21 ERC 1354 (D.N.M. 1984). Although these cases involve a different statute, they do provide an example of similar Congressional intent and action under analogous circumstances.

Based on the statutory language and EPA's implementing regulations, I have determined that the owner of a facility at

which hazardous waste is stored is subject to RCRA and may be held accountable for its violation. 9/ Therefore, Region X acted within its authority in charging respondents Inman and Cragle for RCRA violations at 1930 C Street and assessing civil penalties against them.

Despite provisions in both RCRA and the RCRA regulations that appear to me clearly to impose liability on facility owners, Judge Yost decided that the owners of the 1930 C Street facility were not liable for RCRA violations. I have carefully considered Judge Yost's views on this issue but do not find them persuasive.

Judge Yost acknowledged that:

> [i]t is true . . . that the congressional discussion associated with this Bill indicates that it was Congress' intent to impose liability on owners who are not also the operators of RCRA facilities. Initial Decision at 25.

He added: "I do not believe, however, that it intended the result herein urged by the Agency." Initial Decision at 25. He expressed concern that an absentee owner may not have been alerted to the nature of the activities on his property.

9/ Region 10 filed a motion, dated February 27, 1986, requesting that I consider Administrative Law Judge Gerald Harwood's decision in In the Matter of Aero Plating Works, Inc., RCRA Docket No. V-W-84-R-071-P, holding that owners and operators of hazardous waste facilities are jointly and severally responsible for RCRA permit requirements. Since I received the Region's motion and supporting memorandum after this segment of my decision was written, it is not necessary to rule on the motion. Judge Harwood's decision was not appealed or reviewed sua sponte; it became the Agency's final decision by operation of 40 CFR §22.27(c) on April 4, 1986.

Judge Yost distinguished the CERCLA cases, stating that the reasons for charging an owner with clean-up costs under CERCLA do not apply to the imposition of liability against an absentee owner under RCRA. He notes that:

> [s]ince in the case of CERCLA, the absent and non-participatory land owner has reaped a benefit by the clean-up accomplished by the Government, it is only fair that he share in the costs involved. Such is clearly not the case here where the land owners, Cragle and Inman, were merely arms-length lessors of a discrete piece of real property and had nothing to do with the operation of the business engaged in by the Drexlers. Initial Decision at 9.

Judge Yost stated that EPA could impose liability on an owner only if the owner had incurred vicarious liability as a result of his relationship with the facility operator, based on common law principles of agency or tort law; however, he concluded that neither owner in this instance had a sufficient connection with the hazardous waste operation to be held vicariously liable.[10/] Judge Yost stated that he found persuasive the language of the D.C. Circuit Court in Amoco Oil Company v. EPA, 543 F.2d 270 (D.C. Cir. 1976), a case involving regulations issued under the Clean Air Act Section 211(c)(1)(B)[11/] for the protection of catalytic converter emission control devices. The Court held that a gasoline refiner who leased real estate and equipment to a retail gasoline station was not liable under

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10/ Region X disagreed with Judge Yost's factual determination that the relationship between Cragle and Inman and their lessers provided an insufficient basis for vicarious liability, but has not sought review of this determination.

11/ 42 U.S.C. § 1857f-6(c)(1)(B)(1970).

the Clean Air Act for sales of contaminated gasoline by the gasoline retailer.

In my view, the statute and facts on which the Amoco decision was based are readily distinguishable from those at issue here. Section 211(c)(1)(B) of the Clean Air Act authorized the Administrator to issue regulations controlling the sale of motor fuel and fuel additives. The regulations at issue provided that a gasoline refiner whose name appears at the retail gasoline outlet shall be liable for negligent contamination of gasoline by the retailer with certain exceptions. 40 CFR § 80.23(a)(1). The district court held that EPA lacked statutory authority under the Clean Air Act to impose broad responsibility on refiner-owners of gasoline stations for the conduct of retailers. Lacking such statutory authority, the court considered whether other legal principles might justify imposition of such responsibility on these non-participating owners.

The D.C. Circuit Court held in the Amoco case that a landlord is not generally responsible for the actions of his tenant unless the common law landlord tenant relationship has been altered by statute. The Court said that:

> [t]he authority given to the EPA by Congress [in the Clean Air Act] did not vest the EPA with power to supplant those rules [of tort law] with the doctrine of strict liability.
>
> There is a well defined body of law which determines when negligence may be imputed from one party to another and it is therefore to this law that we must look to judge the legality of the EPA's new liability regulations. 543 F.2d at 275-6. (Emphasis added.)

It added:

> . . . if Congress wants to impose such liability without fault, it can be authorized in a proper way; but Congress has not done so in the existing act. Footnote 13, 543 F.2d at 275.

Judge Skelly Wright dissented, stating that "one may scan the Clean Air Act is vain for any hint that Congress meant EPA to take such a crabbed view of its role." Footnote 12, 543 F.2d at 283-84. Judge Wright stated that vicarious liability may be imposed where the legislature has determined that "such an allocation of responsibility will serve society's ends." 543 F.2d at 281.

It is my judgment that Congress did intend to vest EPA with such authority under RCRA. The statute expressly directs EPA to hold property owners responsible for hazardous waste activities conducted on their property. It spells out no exceptions. The fact that RCRA may have "caught the Drexlers unaware" because of their lack of familiarity with federal regulation of the hazardous waste industry is no defense.

(b) Administrative Law Judge's Authority to Issue Compliance Order

The Region further contends that Judge Yost exceeded his authority when he revised and reissued a Compliance Order against respondents. It is the Region's position that the Administrative Law Judge may not issue a Compliance Order but may only issue a declaratory determination as to the validity of the Regional Administrator's Order. After giving careful consideration to the Regional Administrator's views on this

issue, I have decided that Judge Yost has not exceeded his authority.

The Region claims that the Administrative Law Judge has power under RCRA and the APA only to issue money (i.e., civil penalty) adjudicative orders and cannot adjudicatively order specific relief. It draws a distinction between the penalty assessment in the complaint and the "in personam directives or 'compliance order' aspects" of the process issued by the Regional Administrator. Complainant's Proposed Findings of Fact, Conclusions of Law, and Supporting Memorandum, received July 8, 1985, at 48-49; Memorandum in Support of Appeal, November 21, 1985.

Region X acknowledges that the Administrative Law Judge adjudicates the penalty claim and enters an adjudicatory order pursuant to 5 U.S.C. 554, 556 and the Agency's procedural regulations at 40 CFR Part 22. However, the Region takes the position that 40 CFR Part 22 only governs hearing procedures on the "complaint" aspect of the proceeding; it does not control the disposition of the "compliance order" aspect of the proceeding. The Region does not object to the substance of Judge Yost's compliance order. Its objections are entirely procedural and are focused solely on the decision-making process, not on the Arrcom facts.

Judge Yost's decision-making authority in RCRA cases is governed by the statute and implementing regulations, the Administrative Procedure Act and any express delegations of

authority from the Administrator. I can find no basis in any of them for the distinction that Region X attempts to draw between the compliance and civil penalty aspects of this proceeding.

Section 3008(a) of RCRA provides that:

> the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both . . . . 42 U.S.C. 6928(a).

Section 3008(b) provides that the Administrator shall conduct a public hearing upon the request of any person or persons named in such an order. The Administrator's authority to conduct Section 3008(b) hearings on RCRA violations has been delegated to the Agency's Administrative Law Judges.

The Agency's Consolidated Rules of Practice expressly apply to "adjudicatory proceedings for . . . [t]he issuance of a compliance order or the assessment of any civil penalty conducted under section 3008 of the Solid Waste Disposal Act as amended (42 U.S.C. 6728)." 40 CFR §22.01(a)(4) (emphasis added). Pursuant to these Rules, the presiding officer at the hearing has the authority to adjudicate all issues therein [12/] and to issue an Initial Decision which shall include "a recommended civil penalty assessment, if appropriate, and a proposed final order." [13/] Delegation 1-37 of the Agency's Delegations Manual

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12/ 40 CFR §22.04(c).

13/ 40 CFR § 22.27. The Initial Decision becomes the final order of the Administator if it is not appealed by a party to the proceedings and if the Administrator does not elect to review it sua sponte.

confirms that the Administrative Law Judges shall "hold hearings and perform related duties which the Administrator is required by law to perform in proceedings subject to 5 U.S.C. 556 and 557."

The exercise of adjudicatory powers in this situation is consistent with the Administrative Procedure Act, which defines agency adjudication to mean "agency process for the formulation of an order" and defines an "order" to include "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form . . . ." 5 U.S.C. § 557.

The role of the presiding officer in an administrative proceeding is discussed at length in Louisville Gas and Electric Company Trimble County Power Plant, NPDES Appeal No. 81-3 (decided September 24, 1981):

> In a conventional NPDES proceeding, the hearing serves as a forum for interested persons, including the permit applicant, to contest the terms and conditions of the permit. In such a proceeding the presiding officer is expected to make and, in fact, does make independent or de novo determinations regarding the terms and conditions of the permit based upon the evidence adduced at the hearing. . . .
>
> In short, it is clear that the presiding officer is empowered to make decisions for the Agency. Therefore, as part of the decisionmaking unit of the Agency, the presiding officer, unlike a reviewing court, is free to substitute his judgment for that of a permit issuer where the facts and circumstances warrant it. Final Decision at 8-9.

The quoted language is equally applicable to the role of the presiding officer in a RCRA compliance hearing.

The Region has cited no provision in RCRA or its implementing regulations to lead me to conclude that Judge Yost may not exercise in this instance the full range of powers customarily exercised by the presiding officer in an administrative proceeding. The Regional Administrator claims that the Administrative Law Judge's issuance of a compliance order contradicts Agency Delegation 8-9-A, which authorizes the Regional Administrator to issue compliance orders. However, Delegation 8-9-A does not state that the authority delegated to Regional Administrators to issue compliance orders shall be exclusive. In fact, the Regional Administrator shares such authority with the Assistant Administrator for Solid Waste and Emergency Response. Moreover, Region X is mistaken in its assertion that the Delegations Manual would control in the event of conflict between the Agency's regulations and a particular delegation. I am not persuaded that such a conflict exists. However, in the event that there were a conflict, and in the absence of other factors, the former would be entitled to greater weight. Agency regulations are issued after publication for public comment and represent the considered judgment of the Agency.

The Region acknowledges that 40 CFR Part 22 "delegates to ALJs all the adjudicative powers the Administrator personally holds . . . ," Memorandum in Support of Appeal at 11-12, and further acknowledges that 40 CFR § 22.27 authorizes the Administrative Law Judge to issue a proposed final order. Nevertheless it contends that the Administrator's power to direct com-

pliance is an executive rather than an adjudicative power, and that Section 22.27 refers only to a declaratory order rather than a compliance order. In light of the express link between adjudications and compliance orders in 40 CFR §22.01(a)(4), I cannot agree with the Region.

Conclusion.

For the reasons stated herein, the order of the presiding officer is affirmed as it applies to the individual respondents George and Terry Drexler and the corporate respondents named in the Complaint. The order respecting the facility at 1930 C Street shall apply to Ronald Inman and Richard Cragle who shall be jointly and severally liable with the other named respondents as provided in the Proposed Compliance Order.

So ordered.

Alice P. Wegman for

Ronald L. McCallum
Chief Judicial Officer

Dated: MAY 19 1986

April 30, 1987

SO 125

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. George Drexler
c/o Ramcor Industries
1920 C Street S. and 4610 N. 30th St.
Tacoma, Washington 98402 Tacoma, Washington 98407

Mr. W. Alan Pickett
E. 803 Mission and Box 125
Spokane, Washington 99202 Otis Orchard, Washington 99027

Re: Arrcom/Rathdrum site; Rathdrum, Idaho.

Dear Mr. Drexler and Mr. Pickett:

The Environmental Protection Agency ("EPA") has learned that you recently purchased personal property at the former Arrcom used oil and hazardous waste processing site near Rathdrum, Idaho. As you know, this site is listed on the Superfund National Priorities list due to excessive contamination of the equipment and surrounding soils with hazardous substances. Additionally, the facility is a RCRA regulated treatment, storage and disposal site, subject to all applicable regulations found at 40 CFR Parts 260 through 270. As a result, any activities which you plan at the site, including any removal of property from the site or use of the property, must be done in accordance with the statutes and regulations associated with applicable laws, and must not interfere with the Superfund cleanup activities at the site. Specifically, property at the site cannot be used or taken from the site without explicit permission from EPA to do so.

For your information, EPA plans a Superfund cleanup and removal action at the site within the next few weeks. That cleanup will involve the decontamination of the tanks at the site, including the destruction of some heavily contaminated tanks and equipment; and possible decontamination of the trucks at the site, as well as other cleanup and investigation activities. I repeat, the tanks and the trucks located on site should not be moved or disturbed in any manner prior to that cleanup. Because the removal activities are limited in scope and because of EPA's failure to obtain cooperation from

you or other responsible parties in the past in conducting cleanup activities at the site, EPA will not invoke the special negotiation procedures of section 122 of CERCLA, 42 U.S.C. § 9622, or offer responsible parties the opportunity to perform these removal activities.

I include one final reminder to you. In an administrative proceeding concluded in 1986, the Arrcom/Rathdrum site was found to be a RCRA regulated site subject to the various regulations covering a treatment, storage and disposal facility under RCRA, 42 U.S.C. § 6901 et seq. That same proceeding found that a $4,500 penalty for violation of these regulations was due from George Drexler, Thomas Drexler, W.A. Pickett, and various corporations jointly and severally. That penalty has not been paid. In addition, the closure plan for the facility, which is required from the owners and operators of that site pursuant to 40 CFR Part 265, Subpart G, is due. Submittal of the closure plan and closure activities should be implemented at the site immediately. Of course, use of the tanks or other equipment at the facility prior to closure plan implementation is forbidden by law. Your failure to pay the penalty and submit the closure plan is a violation of federal law and the Administrative Law Judge's order, and should be addressed by you with all due speed.

If you have further questions or comments on this matter, please contact me at (206) 442-1191.

Sincerely,

D. Henry Elsen
Assistant Regional Counsel

cc: Warren Bingham
Stephen Navaretta, Attorney
Thomas Drexler
Jeff Ring, Assistant United States Attorney
District of Idaho
Ned Bergman, U.S. Parole Office

bcc: Carl Kitz
John Meyer
Stephanie Mead

Telephone (206) 622-6331

Stephen Navaretta
Attorney-At-Law

13th Floor Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

July 11, 1985

Henry Elsen, Esq.
EPA Region 10
1200 Sixth Ave.
Seattle, WA 98101

Re: Bingham

Dear Henry:

Please review this agreement and confirm that the agreement does not satisfy the negative condition set forth as Attachment 2 the agreed order.

Very truly yours,

Stephen Navaretta

SN/mjn
Enc.

7

AGREEMENT TO PURCHASE IMPROVED REAL AND PERSONAL PROPERTY

I Parties

1.1 Seller is Warren Bingham residing at (b) (6) (b) (6)

1.2 Purchaser is Golconda Corporate Resources Incorporated, Suite A East 10905 Montgomery Avenue, Spokane, Washington 99206.

II Property to be Purchased

2.1 The legal description of the real property to be purchased is attached hereto as Exhibit A.

2.2 The real property described in paragraph 2.1 will be sold together with all personalty located upon such real property on the date of this agreement, specifically including without limitation the tanks, equipment and tools formerly used to operate an oil processing plant on the site.

2.3 Purchaser agrees to purchase the real property and personal property "as-is" and expressly agrees that no representation has been made by Seller regarding the operability, usability or physical condition of the personal property to be purchased.

2.4 The property both real and personal described herein may also be referred to hereinafter as the "facility" or the "Rathdrum hazardous waste management facility."

III Purchase Price

3.1 Seller agrees to pay Purchaser upon closing 60,000. shares of the common stock of Clark Medical-Technical, Inc. for the facility.

3.2 In further consideration for the purchase of the facility Purchaser agrees:

a. To submit no later than October 15, 1985, a written closure plan to the United States Environmental Protection Agency Region 10 (EPA Region 10) for the Rathdrum hazardous waste management facility pursuant to all applicable parts of 40 Code of Federal Regulations Part 265.110-265.120, Subpart G (1984). Said regulations are incorporated herein by this reference; and

b. To immediately upon approval or modification of the closure plan submitted pursuant to paragraph 2.2.a. by EPA Region 10 complete implementation of the approved or modified written closure plan not later than 180 days after the date of approval or modification, excluding the date of approval or modification; and

c. To submit to EPA Region 10 a certification of closure

which complies with 40 CFR s 265.115 after implementation of the closure plan is complete for the Rathdrum hazardous waste management facility.

3.3 In further consideration for the purchase of the facility Purchaser agrees to assume that certain real estate contract between Frank and Hilda Bundy as vendors and William Alan Pickett, Jean R. Pickett, Jimmie Alan Peterson and Betty A. Peterson as vendees recorded in the records of Kootenai County, Idaho under recording number 596582 and found at Book 70 Page 493 of said records and that certain real estate contract between William Alan Pickett as vendors and Arrcom, Inc. as vendees recorded in the records of Kootenai County under recording number 829998 and to pay and satisfy said contracts in accordance with its terms.

IV Conveyance

4.1 Seller will deliver to Purchaser a duly executed and acknowledged Quit Claim Deed assigning all of Sellers interest, including after acquired title in the real property of the facility. Said Quit Claim Deed will recite the assumptions of real estate contracts as agreed to and set forth in paragraph 3.3 of this agreement.

4.2 Seller will deliver to Purchaser a duly executed Bill of Sale for all the personal property located on the facility.

V Notification, Hold Harmless and Indemnification

5.1 Seller hereby notifies Purchaser that as owner of the Rathdrum hazardous waste management facility it has responsibilities and duties as set forth in 40 Code of Federal Regulations Part 264 and 265. Purchaser agrees to hold Seller harmless from, and indemnify him for, any costs, expenses, fines, penalties, fees or other such monetary expense without limitation as may arise from Purchaser's failure to comply with the requirements of paragraph 3.2 of this agreement, Purchaser's ownership and/or operation of the facility and any requirements imposed or ordered by EPA Region 10 or its equivalent additional to those set forth in paragraph 3.2 of this agreement.

VI Non-Merger

6.1 This agreement shall survive closing of this transaction and not merge in any conveyance issued in connection herewith.

VII Closing

7.1 The sale contemplated hereby shall close in the law office of Stephen Navaretta when the following documents are in possession of Stephen Navaretta:

(a) Stock certificates endorsed for transfer to Purchasers in the amount called for herein;

(b) A Corporate resolution of Purchaser authorizing the purchase;

(c) A copy of this agreement signed by each party, although separate copies may be signed;

(d) A signed Quit Claim Deed and Bill of Sale as specified herein;

(e) A written confirmation from EPA Region 10 that the sale contemplated by this agreement does not satisfy the negative condition found at Attachment 2 of Agreed Settlement Order dated June 20, 1985, in Case #83-04-02-3008.

7.2 Closing shall consist of Stephen Navaretta mailing the Quit Claim Deed and Bill of Sale to Purchaser at its address above described. Stephen Navaretta will have no responsibility for any filing or recording of these documents. Stephen Navaretta will notify the appropriate transfer agent to effect a transfer of ownership to seller of the stock certificates provided by Purchasers. Stephen Navaretta has not offered any opinion to Sellers on the value or alienability of the stock certificates recited as partial consideration for the sale herein.

DATED this _____ day of _____, 1985.

Warren Bingham	Golconda Corporate Resources, Inc. by William Campbell, authorized officer

Description of the Facility

That portion of the Tracts 17 and 24, Plat No. 2, GREENACRES IRRIGATION DISTRICT, Kootenai County, Idaho, according to the plat thereof recorded in Book B of Plats at Page 51, records of Kootenai County, Idaho, described as follows:

COMMENCING at the Northeast corner of said Tract 24; thence, North 89°32'45" West along the North line of said Tract 24, 208.0 feet to the Southwest corner of land described in the deed to Sam Green and wife recorded October 26, 1961 in Book 187 of Deeds at Page 216; being the TRUE POINT OF BEGINNING; thence, South 10°26'45" East 241.15 feet to a point on the Northwesterly line of State Highway 53; thence, South 49°20' West along said Northwesterly line 209.0 feet to an intersection with the Easterly line of land described in the deed to Theodore Day and wife recorded June 2, 1978 in Book 291 of Deeds at Page 449; thence, North 4°24' West along said Easterly line, 408.0 feet to the most Southerly Southwest corner of land described in the deed to Theodore Day and wife recorded April 21, 1978 in Book 290 of Deeds at Page 484; thence, South 89°32'45" East along the South line of said Day land, 147.1 feet to a point on the West line of land described in said deed to Sam Green and wife above mentioned; thence, South 0°24' West along said West line, 31.5 feet to the TRUE POINT OF BEGINNING.

Exhibit A - Rathdrum Facility Sale

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

AUG 7 19

REPLY TO
ATTN OF Mail Stop 613

Stephen Navaretta, Esq.
13th Floor, Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

Dear Mr. Navaretta:

I have reviewed the Agreement to Purchase Improved Real and Personal Property between Warren Bingham and Golconda Corporate Resources, Incorporated, regarding certain property known as the Rathdrum facility near Rathdrum, Idaho.

In that the Agreement constitutes a written promise by the transferee to perform all decretal terms and provisions of the Agreed Settlement Order, No. X83-04-02-3008, between the Environmental Protection Agency Region 10 and Warren Bingham (dated June 20, 1985), the Agreement does not satisfy the negative condition found at Attachment 2 of said Agreement, and does not violate the said Agreement.

Sincerely,

D. Henry Elsen
Assistant Regional Counsel

Telephone (206) 622-6331

Stephen Navaretta
Attorney-At-Law

13th Floor Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

August 8, 1985

Henry Elsen, Esq.
EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

Dear Mr. Elsen:

Please consider this written evidence that Warren Bingham has exercised his best efforts to comply with affirmative condition 1.a of Attachment 1 to the Agreed Order Re: Respondent Bingham in EPA Cause No. X83-04-01-3008 and 83-04-02-3008.

Mr. Bingham has made substantial efforts to sell the property to an entity financially responsible and able to close the Rathdrum facility pursuant to the agreement. Unfortunately, a bona fide offer, which would have resolved the matter pending performance of the buyer, has been withdrawn.

While attempting to sell the property Mr. Bingham, through counsel, has made contact with environmental consultants including Dames and Moore and Envirosafe of Idaho and has obtained advice and input from these concerns including cost estimates and preliminary plans of action. Because of the offer received for the facility which proceeded to preparation of the final documents, the follow through with the consultants was delayed. We have only learned of the loss of the sale on August 7, 1985 and activation of consulting efforts cannot yield a closure plan by August 20, 1985. My client understands his responsibilities and will meet them.

Very truly yours,

Stephen Navaretta

SN/mjn

Telephone (206) 622-6331

Stephen Navaretta
Attorney-At-Law

13th Floor Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

August 8, 1985

Henry Elsen, Esq.
EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

Dear Henry:

The offer contemplated by the sale agreement I sent you has been withdrawn. If you can, please indicate whether the concept utilized in the proposed agreement is suitable to avoid the negative condition if another offer is received.

Very truly yours,

Stephen Navaretta

SN/mjn

August 14, 1985

Mail Stop 613

Stephen Navaretta, Esq.
13th Floor, Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

Dear Mr. Navaretta:

This letter is in reply to your letter of August 9, 1985.

The proposed form of sale for the ARRCOM/Rathdrum facility addresses the applicable provisions of the Agreed Final Order, No. 1083-04-02-3008, in an adequate manner such that the agreed order, including its negative condition, is not violated.

Sincerely,

D. Henry Elsen
Assistant Regional Counsel

ELSEN:ps:8-14-85 (#2-25)

Telephone (206) 622-6331

Stephen Navaretta
Attorney-At-Law

13th Floor Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

October 7, 1985

Henry Elsen, Esq.
EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

Dear Henry:

Mr. Bingham is experiencing great difficulty in financing development of a closure plan for Rathdrum. Further, the State of Idaho is seeking the sale of the property per the enclosed tax sale notice.

In view of the situation apparent from the foregoing an extension of time to submit a closure plan beyond the current deadline of October 20, 1985, is requested.

Very truly yours,

Stephen Navaretta

SN/mjn
Enc.
cc: Warren Bingham

U. ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

MAY 2 1986

REPLY TO
ATTN OF:

M/S 613

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Warren Bingham
(b) (6)

Dear Mr. Bingham:

On June 20, 1985, Agreed Order Regarding Penalties No. X83-04-02-3008 (pursuant to Section 3008 of RCRA, 42 U.S.C. §6912), was issued to you by the Environmental Protection Agency ("EPA"). That Order was the result of settlement negotiations between you and EPA prior to a hearing on the matter under case No. X83-04-02-3008, and bore your attorney's signature stipulating to its validity. The Order imposed penalties of $15,000 for activities at your Rathdrum, Idaho, hazardous waste facility, but suspended and deferred those penalties on condition that you initiate closure activities at the site, as required under a Compliance Order issued to you on April 27, 1983.

You are now severely out of compliance with both the Agreed Order and the Compliance Order. Although the Agreed Order required you to submit a closure plan for the facility by October 20, 1985, to date no closure plan has been received. This is a violation of affirmative Condition #2 of the Agreed Order. In addition, EPA has been informed that the facility was sold at public auction to Kootenai County, State of Idaho. This is a violation of negative Condition #1 of the Agreed Order.

Therefore, pursuant to paragraph 5 of the Agreed Order, the $15,000 penalty imposed under the Agreed Order is hereby due and payable. Payment, in the form of a certified check or money order, should be made to:

Environmental Protection Agency
Region 10
(Regional Hearing Clerk)
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

8

with a copy of the remittance to:

Regional Hearing Clerk
EPA, Region 10
1200 Sixth Avenue, M/S 613
Seattle, Washington 98101

If payment is not received within thirty (30) days of the date of receipt of this letter, interest will accrue on this debt, pursuant to 31 U.S.C. ~~§3162.~~ 3717

Whether or not this penalty payment is received by EPA, you have other remaining legal obligations at the Rathdrum facility. As an owner of the facility (whether present or former), you are required to close the facility according to RCRA regulations. These obligations emanate from the Compliance Order, which was issued to you on April 27, 1983, and from RCRA interim status regulations, which require the implementation of a closure plan within 90 days after receiving the final volume of hazardous waste [40 C.F.R. §265.113(a)], or after interim status is terminated [40 C.F.R. §§265.112(c) and 265.113(a)]. Both of these events occurred some time ago. Therefore, the regulations require you to submit and implement a closure plan for the facility with all due speed.

Accordingly, within thirty (30) days of the date of receipt of this letter, you must submit a closure plan for the facility in full compliance with 40 C.F.R. Part 265, Subpart G. This plan should be submitted to:

Ken Feigner, Branch Chief
Hazardous Waste Management, M/S 524
Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

After approval of the closure plan, pursuant to 40 C.F.R. §265.112, you are required to implement that plan within 180 days of approval.

In addition, 40 C.F.R. §265.114 requires a fence at the site sufficient to prevent unauthorized entry at the facility. In order to address immediate hazards to the surrounding community, this fence should be installed. This activity must be commenced within thirty (30) days of receipt of this letter.

Any failure to pay the penalty or to submit and implement the closure plan and fence construction may result in referring this action to the Department of Justice for formal legal action. This action may be in the form of civil or criminal charges being filed against you in a court of law.

If you have any questions or comments on this matter, please contact me at (206) 442-1191. I look forward to a prompt and effective resolution of this matter. Environmental problems evident at the facility require such a timely response.

Sincerely,

D. Henry Elsen

D. Henry Elsen
Assistant Regional Counsel

cc: County Treasurer, Kootenai County
Stephen Navaretta, Attorney
Jeffery Ring, AUSA-Idaho

STEPHEN NAVARETTA

ATTORNEY AT LAW

September 2, 1986

Henry Elsen, Esq.
Environmental Protection Agency
Park Place Building
Seattle, WA 98101

Re: Rathdrum, Idaho (Warren Bingham)

Dear Mr. Elsen:

I am still confident that a resolution of the Rathdrum matter depends on the immediate cooperation of all concerned parties. Neither of us is able to persuade the other of the ultimate consequence of the transfer of title from Bundy to Kootenai County. I am convinced that as a present owner with notice theCounty must answer to the requirements of the law.

I urge you to reconsider my proposal for a tripartite meeting so that we can move towards an end to this matter.

Very truly yours,

Stephen Navaretta

SN/mjn

Telephone (206) 622-6331

Stephen Navaretta
Attorney-At-Law

13th Floor Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

July 23, 1986

Henry Elsen, Esq.
U.S.E.P.A.
Region 10
1200 Sixth Avenue
Seattle, WA 98101

Re: ARRCOM Site-Rathdrum, Idaho

Thank you for your letter of July 17, 1986.

In response to your characterizations of the preceding events I must correct your misapprehension of the facts. The only phone call I received in response to my letter of October 7, 1985, was a general inquiry on the status of the closure plan and an assurance that a response would be issued. As we know no direct response to the extension request has ever been issued.

I am forwarding your letter to Mr. Bingham and will consult with him once he has a chance to review it. I am presently relocating my practice and will be unable to respond further until shortly after August 4, 1986.

My new address as of August 4, 1986 is:

1726 C Okeechobee Road--Suite 105
Fort Pierce, FL 33450

Very truly yours,

Stephen Navaretta

SN/mjn

July 17, 1986

M/S 613

Stephen Navaretta, Attorney
13th Floor--Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

Re: ARRCOM Site - Rathdrum, Idaho

Dear Mr. Navaretta:

This letter addresses your letter of May 9, 1986, and subsequent telephone conversations.

The Environmental Protection Agency rejects your explananation for noncompliance by Mr. Bingham with Consent Order No. X83-04-02-3008.

First, your request for an extension of time, dated October 7, 1985, was never granted in writing, as is required in the Consent Order. Telephone conversations between you and EPA personnel shortly after that request was received by EPA indicated you had not begun to prepare compliance plans for the ARRCOM facility. Because of that, EPA saw no basis to grant an extension and did not do so. We believe this was clear to you at the time of the telephone conversations. Consequently, the order deadlines stood and stand as Mr. Bingham's obligations under the agreement.

Second, claims of impossibility because of the recent tax sale are not valid. The County of Kootenai, the current holder of title at the site, does not object to granting access to the site to your client for closure activities. The tax foreclosure does not make Mr. Bingham's performance of the consent agreement impossible.

In short, there is no valid reason for Mr. Bingham's noncompliance with the negotiated consent agreement. By the terms of that agreement, Mr. Bingham now owes the government fifteen thousand dollars. In addition, Mr. Bingham continues to have a duty to close the ARRCOM-Rathdrum facility, pursuant to applicable laws and regulations.

In our telephone conversation, you suggested a meeting between Mr. Bingham and EPA, possibly involving Kootenai County

representatives. In view of Mr. Bingham's past misuse of negotiated settlements, EPA declines to have such a meeting until it receives valid closure plans for the site from Mr. Bingham. No decision on the potential liability of the county at the site has been made at this time.

I can be reached at (206) 442-1191.

Sincerely,

D. Henry Elsen
Assistant Regional Counsel

ELSEN:ps:7-15-86 (AR #1-32)

MEAD RICE FEIGNER

Telephone (206) 622-6331

Stephen Navaretta
Attorney-At-Law

13th Floor Seattle Tower
1218 Third Avenue
Seattle, Washington 98101

May 9, 1986

Henry Elsen, Esq.
EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

Re: Bingham

Dear Mr. Elsen:

I am in receipt of a copy of your letter to my clients dated May 2, 1986.

Your letter is in serious error and fails to accurately reflect actual events in the following particulars:

1. On October 7, 1986, a request for an extension of time to file the required closure plan was requested. A notice of the pending Idaho tax foreclosure was enclosed. No response to the request for extension was ever received.

2. Mr. Bingham had no responsibility or duty to pay the past due real estate taxes on the Rathdrum property. The record owner is specified on the notice of foreclosure as Mr. Frank Bundy who, in fact, is the fee owner of the property.

3. The tax foreclosure alluded to is not a "sale or transfer" within the contemplation of negative condition 1 of the penalty order.

4. Mr. Bingham has no present right, interest or title in the Rathdrum property due to the tax foreclosure. Upon the tax foreclosure caused by Mr. Bundy's inability or unwillingness to cure the existing tax default performance by Mr. Bingham was rendered impossible and was thus, under law, excused.

In summary, based upon the delay of EPA in responding to a timely request for extension and the intervening impossibility of performance and frustration of purpose precipitated by the tax foreclosure it is disputed that the penalty demanded in your letter is due.

Additionally, it is my understanding that Kootenai County foreclosed Mr. Bingham's interest in the property with complete notice of the duties of ownership under RCRA. As such, even though no notice is required, Kootenai County has acquired duties of compliance and closure fully enforceable by EPA.

I suggest that a meeting be scheduled to discuss the terms upon which Mr. Bingham's connection with this mater can be terminated and the owners of the property can effect closure.

Very truly yours,

Stephen Navaretta

SN/mjn

(c) Fuel from hazardous waste.—Not later than two years after November 8, 1984, and after opportunity for public hearing, the Administrator shall promulgate regulations establishing standards, applicable to transporters of fuel produced (1) from any hazardous waste identified or listed under section 6921 of this title, or (2) from any hazardous waste identified or listed under section 6921 of this title and any other material, as may be necessary to protect human health and the environment. Such standards may include any of the requirements set forth in paragraphs (1) through (4) of subsection (a) of this section as may be appropriate.

Pub.L. 89–272, Title II, § 3003, as added Pub.L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2807, as amended Pub.L. 95–609, § 7(g), Nov. 8, 1978, 92 Stat. 3082, Pub.L. 98–616, Title II, § 204(b)(2), Nov. 8, 1984, 98 Stat. 3238.

§ 6924. Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities [RCRA § 3004]

(a) In general.—Not later than eighteen months after October 21, 1976, and after opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. In establishing such standards the Administrator shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such regulations. Such standards shall include, but need not be limited to, requirements respecting—

(1) maintaining records of all hazardous wastes identified or listed under this chapter which is treated, stored, or disposed of, as the case may be, and the manner in which such wastes were treated, stored, or disposed of;

(2) satisfactory reporting, monitoring, and inspection and compliance with the manifest system referred to in section 6922(5) of this title;

(3) treatment, storage, or disposal of all such waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator;

(4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;

(5) contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of any such hazardous waste;

(6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable; and

(7) compliance with the requirements of section 6925 of this title respecting permits for treatment, storage, or disposal.

No private entity shall be precluded by reason of criteria established under paragraph (6) from the ownership or operation of facilities providing hazardous waste treatment, storage, or disposal services where such entity can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage, or disposal of specified hazardous waste.

(b) Salt dome formations, salt bed formations, underground mines and caves.—(1) Effective on November 8, 1984, the placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as—

(A) the Administrator has determined, after notice and opportunity for hearings on the record in the affected areas, that such placement is protective of human health and the environment;

(B) the Administrator has promulgated performance and permitting standards for such facilities under this subchapter, and;

(C) a permit has been issued under section 6925(c) of this title for the facility concerned.

(2) Effective on November 8, 1984, the placement of any hazardous waste other than a hazardous waste referred to in paragraph (1) in a salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as a permit has been issued under section 6925(c) of this title for the facility concerned.

(3) No determination made by the Administrator under subsection (d), (e), or (g) of this section regarding any hazardous waste to which such subsection (d), (e), or (g) applies shall affect the prohibition contained in paragraph (1) or (2) of this subsection.

(4) Nothing in this subsection shall apply to the Department of Energy Waste Isolation Pilot Project in New Mexico.

be modified, if necessary, to cover at a minimum all requirements and standards described in section 6991b of this title.

(x) Mining and other special wastes.—If (1) solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium, (2) fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, or (3) cement kiln dust waste, is subject to regulation under this subchapter, the Administrator is authorized to modify the requirements of subsections (c), (d), (e), (f), (g), (*o*), and (u) of this section and section 6925(j) of this title, in the case of landfills or surface impoundments receiving such solid waste, to take into account the special characteristics of such wastes, the practical difficulties associated with implementation of such requirements, and site-specific characteristics, including but not limited to the climate, geology, hydrology and soil chemistry at the site, so long as such modified requirements assure protection of human health and the environment.

Pub.L. 89–272, Title II, § 3004, as added Pub.L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2807, as amended Pub.L. 96–482, § 9, Oct. 21, 1980, 94 Stat. 2338, Pub.L. 98–616, Title II, §§ 201(a), 202(a), 203, 204(b)(1), 205–209, Nov. 8, 1984, 98 Stat. 3226, 3233, 3234, 3236, 3238–3240.

§ 6925. Permits for treatment, storage, or disposal of hazardous waste [RCRA § 3005]

(a) Permit requirements.—Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of Title 15 for the incineration of polycholorinated [1] biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter.

1. So in original.

(b) Requirements of permit application.—Each application for a permit under this section shall contain such information as may be required under regulations promulgated by the Administrator, including information respecting—

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter, or combinations of any such hazardous waste and any other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

(c) Permit issuance.—(1) Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 of this title, the permit shall specify the time allowed to complete the modifications.

(2)(A)(i) Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(ii) Not later than the date five years after November 8, 1984, in the case of each application for a permit under this subsection for an incinerator facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(B) Not later than the date eight years after November 8, 1984, in the case of each application for a permit under this subsection for any facility (other than a facility referred to in subparagraph (A)) which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(C) The time periods specified in this paragraph shall also apply in the case of any State which is administering an authorized hazardous waste program under section 6926 of this title. Interim status under subsection (e) of this section shall terminate for each facility referred to in subparagraph (A)(ii)

or (B) on the expiration of the five- or eight-year period referred to in subparagraph (A) or (B), whichever is applicable, unless the owner or operator of the facility applies for a final determination regarding the issuance of a permit under this subsection within—

(i) two years after November 8, 1984 (in the case of a facility referred to in subparagraph (A)(ii)), or

(ii) four years after November 8, 1984 (in the case of a facility referred to in subparagraph (B)).

(3) Any permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 6924 of this title. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of any application for a permit renewal shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

(d) Permit revocation.—Upon a determination by the Administrator (or by a State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) of noncompliance by a facility having a permit under this chapter with the requirements of this section or section 6924 of this title, the Administrator (or State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) shall revoke such permit.

(e) Interim status.—(1) Any person who—

(A) owns or operates a facility required to have a permit under this section which facility—

(i) was in existence on November 19, 1980, or

(ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,

(B) has complied with the requirements of section 6930(a) of this title, and

(C) has made an application for a permit under this section

shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. This paragraph shall not apply to any facility which has been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

(2) In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984 interim status shall terminate on the date twelve months after November 8, 1984 unless the owner or operator of such facility—

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(3) In the case of each land disposal facility which is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section and which is granted interim status under this subsection, interim status shall terminate on the date twelve months after the date on which the facility first becomes subject to such permit requirement unless the owner or operator of such facility—

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after the date on which the facility first becomes subject to such permit requirement; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(f) Coal mining wastes and reclamation permits.—Notwithstanding subsection (a) through (e) of this section, any surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under the Surface Mining Control and Reclamation Act of 1977 shall be deemed to be a permit issued pursuant to this section with respect to the treatment, storage, or disposal of such wastes or overburden. Regulations promul-

of such inspections shall be available to the public as provided in subsection (b) of this section.

(d) State-operated facilities.—The Administrator shall annually undertake a thorough inspection of every facility for the treatment, storage, or disposal of hazardous waste which is operated by a State or local government for which a permit is required under section 6925 of this title. The records of such inspection shall be available to the public as provided in subsection (b) of this section.

(e) Mandatory inspections.—(1) The Administrator (or the State in the case of a State having an authorized hazardous waste program under this subchapter) shall commence a program to thoroughly inspect every facility for the treatment, storage, or disposal of hazardous waste for which a permit is required under section 6925 of this title no less often than every two years as to its compliance with this subchapter (and the regulations promulgated under this subchapter). Such inspections shall commence not later than twelve months after November 8, 1984. The Administrator shall, after notice and opportunity for public comment, promulgate regulations governing the minimum frequency and manner of such inspections, including the manner in which records of such inspections shall be maintained and the manner in which reports of such inspections shall be filed. The Administrator may distinguish between classes and categories of facilities commensurate with the risks posed by each class or category.

(2) Not later than six months after November 8, 1984, the Administrator shall submit to the Congress a report on the potential for inspections of hazardous waste treatment, storage, or disposal facilities by nongovernmental inspectors as a supplement to inspections conducted by officers, employees, or representatives of the Environmental Protection Agency or States having authorized hazardous waste programs or operating under a cooperative agreement with the Administrator. Such report shall be prepared in cooperation with the States, insurance companies offering environmental impairment insurance, independent companies providing inspection services, and other such groups as appropriate. Such report shall contain recommendations on provisions and requirements for a program of private inspections to supplement governmental inspections.

Pub.L. 89–272, Title II, § 3007, as added Pub.L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2810, as amended Pub.L. 95–609, § 7(j), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 96–482, § 12, Oct. 21, 1980, 94 Stat. 2339, Pub.L. 98–616, Title II, §§ 229–231, Title V, § 502(a), Nov. 8, 1984, 98 Stat. 3255, 3256, 3276.

§ 6928. Federal enforcement [RCRA § 3008]

(a) Compliance orders.—(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator deter-

mines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(b) Public hearing.—Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

(c) Violation of compliance orders.—If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

(d) Criminal penalties.—Any person who—

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest; or[1]

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the

1. So in original. Directory language of section 245(c) of Pub.L. 98–616 resulted in two semi-colons at the end of subsec. (d)(5).

respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment.—Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter in violation of paragraph (1), (2), (3), (4), (5), or (6) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(f) Special rules.—For the purposes of subsection (e) of this section—

(1) A person's state of mind is knowing with respect to—

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(A) an occupation, a business, or a profession; or

(B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term "serious bodily injury" means—

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(g) Civil penalty.—Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

(h) Interim status corrective action.—(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an

order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

Pub.L. 89–272, Title II, § 3008, as added Pub.L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2811, as amended Pub.L. 95–609, § 7(k), Nov. 8, 1978, 92 Stat. 3082; Pub.L. 96–482, § 13, Oct. 21, 1980, 94 Stat. 2339, Pub.L. 98–616, Title II, §§ 232, 233, 245(c), Title IV, § 403(d)(1)–(3), Nov. 8, 1984, 98 Stat. 3256, 3257, 3264, 3272.

§ 6929. Retention of State authority [RCRA § 3009]

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or in any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

Pub.L. 89–272, Title II, § 3009, as added Pub.L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2812, and amended Pub.L. 96–482, § 14, Oct. 12, 1980, 94 Stat. 2342, Pub.L. 98–616, Title II, § 213(b), Nov. 8, 1984, 98 Stat. 3242.

§ 6930. Effective date [RCRA § 3010]

(a) Preliminary notification.—Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. Not later than fifteen months after November 8, 1984—

APPENDIX VI—POLITICAL JURISDICTIONS[1] IN WHICH COMPLIANCE WITH § 264.18(a) MUST BE DEMONSTRATED

ALASKA

Aleutian Islands
Anchorage
Bethel
Bristol Bay
Cordova-Valdez
Fairbanks-Fort Yukon
Juneau
Kenai-Cook Inlet
Ketchikan-Prince of Wales
Kodiak
Lynn Canal-Icy Straits
Palmer-Wasilla-Talkeena
Seward
Sitka
Wade Hampton
Wrangell Petersburg
Yukon-Kuskokwim

ARIZONA

Cochise
Graham
Greenlee
Yuma

CALIFORNIA

All

COLORADO

Archuleta
Conejos
Hinsdale
Mineral
Rio Grande
Saguache

HAWAII

Hawaii

IDAHO

Bannock
Bear Lake
Bingham
Bonneville
Caribou
Cassia
Clark
Franklin
Fremont
Jefferson
Madison
Oneida
Power
Teton

MONTANA

Beaverhead
Broadwater
Cascade
Deer Lodge
Flathead
Gallatin
Granite
Jefferson
Lake
Lewis and Clark
Madison
Meagher
Missoula
Park
Powell
Sanders
Silver Bow
Stillwater
Sweet Grass
Teton
Wheatland

[1] These include counties, city-county consolidations, and independent cities. In the case of Alaska, the political jurisdictions are election districts, and, in the case of Hawaii, the political jurisdiction listed is the island of Hawaii.

NEVADA

All

NEW MEXICO

Bernalillo
Catron
Grant
Hidalgo
Los Alamos
Rio Arriba
Sandoval
Sante Fe
Sierra
Socorro
Taos
Torrance
Valencia

UTAH

Beaver
Box Elder
Cache
Carbon
Davis
Duchesne
Emery
Garfield
Iron
Juab
Millard
Morgan
Piute
Rich
Salt Lake
Sanpete
Sevier
Summit
Tooele
Utah
Wasatch
Washington
Wayne
Weber

WASHINGTON

Chelan
Clallam
Clark
Cowlitz
Douglas
Ferry
Grant
Grays Harbor
Jefferson
King
Kitsap
Kittitas
Lewis
Mason
Okanogan
Pacific
Pierce
San Juan Islands
Skagit
Skamania
Snohomish
Thurston
Wahkiakum
Whatcom
Yakima

WYOMING

Fremont
Lincoln
Park
Sublette
Teton
Uinta
Yellowstone National Park

[46 FR 57285, Nov. 23, 1981; 47 FR 953, Jan. 8, 1982]

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

Subpart A—General

Sec.
265.1 Purpose, scope, and applicability.
265.2—265.3 [Reserved]
265.4 Imminent hazard action.

Sec.

Subpart B—General Facility Standards

265.10 Applicability.
265.11 Identification number.
265.12 Required notices.
265.13 General waste analysis.
265.14 Security.
265.15 General inspection requirements.
265.16 Personnel training.
265.17 General requirements for ignitable, reactive, or incompatible wastes.
265.18 Location standards.

Subpart C—Preparedness and Prevention

265.30 Applicability.
265.31 Maintenance and operation of facility.
265.32 Required equipment.
265.33 Testing and maintenance of equipment.
265.34 Access to communications or alarm system.
265.35 Required aisle space.
265.36 [Reserved]
265.37 Arrangements with local authorities.

Subpart D—Contingency Plan and Emergency Procedures

265.50 Applicability.
265.51 Purpose and implementation of contingency plan.
265.52 Content of contingency plan.
265.53 Copies of contingency plan.
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265.55 Emergency coordinator.
265.56 Emergency procedures.

Subpart E—Manifest System, Recordkeeping and Reporting

265.70 Applicability.
265.71 Use of manifest system.
265.72 Manifest discrepancies.
265.73 Operating record.
265.74 Availability, retention, and disposition of records.
265.75 Biennial report.
265.76 Unmanifested waste report.
265.77 Additional reports.

Subpart F—Ground-Water Monitoring

265.90 Applicability.
265.91 Ground-water monitoring system.
265.92 Sampling and analysis.
265.93 Preparation, evaluation, and response.
265.94 Recordkeeping and reporting.

Subpart G—Closure and Post-Closure

265.110 Applicability.
265.111 Closure performance standard.

NEVADA

NEW MEXICO

alillo	Sante Fe
on	Sierra
t	Socorro
lgo	Taos
Alamos	Torrance
Arriba	Valencia
oval	

UTAH

er	Piute
Elder	Rich
e	Salt Lake
on	Sanpete
s	Sevier
esne	Summit
y	Tooele
ield	Utah
	Wasatch
	Washington
rd	Wayne
an	Weber

WASHINGTON

an	Mason
am	Okanogan
	Pacific
itz	Pierce
las	San Juan Islands
	Skagit
t	Skamania
s Harbor	Snohomish
rson	Thurston
	Wahkiakum
p	Whatcom
tas	Yakima
s	

WYOMING

ont	Teton
ln	Uinta
	Yellowstone National
tte	Park

R 57285, Nov. 23, 1981; 47 FR 953, Jan. 32]

T 265—INTERIM STATUS STANDRDS FOR OWNERS AND OPERAORS OF HAZARDOUS WASTE REATMENT, STORAGE, AND DISOSAL FACILITIES

Subpart A—General

Purpose, scope, and applicability.
—265.3 [Reserved]
Imminent hazard action.

Sec.

Subpart B—General Facility Standards

Subpart C—Preparedness and Prevention

Subpart D—Contingency Plan and Emergency Procedures

Subpart E—Manifest System, Recordkeeping, and Reporting

Subpart F—Ground-Water Monitoring

Subpart G—Closure and Post-Closure

Subpart H—Financial Requirements

Subpart I—Use and Management of Containers

Subpart J—Tanks

Subpart K—Surface Impoundments

AUTHORITY: Secs. 1006, 2002(a), 3004, 3005 and 3015, Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935).

SOURCE: 45 FR 33232, May 19, 1980, unless otherwise noted.

EDITORIAL NOTE: The reporting or recordkeeping provisions included in the final rule published at 47 FR 32274, July 26, 1982, will be submitted for approval to the Office of

Management and Budget and will not become effective until OMB approval has been obtained. EPA will publish a notice in the FEDERAL REGISTER after it obtains OMB approval.

Subpart A—General

§ 265.1 Purpose, scope, and applicability.

(a) The purpose of this part is to establish minimum national standards that define the acceptable management of hazardous waste during the period of interim status and until certification of final closure or, if the facility is subject to post-closure requirements, until post-closure responsibilities are fulfilled.

(b) The standards of this part apply to owners and operators of facilities that treat, store or dispose of hazardous waste who have fully complied with the requirements for interim status under section 3005(e) of RCRA and § 270.10 of this chapter until either a permit is issued under section 3005 of RCRA or until applicable Part 265 closure and post-closure responsibilities are fulfilled, and to those owners and operators of facilities in existence on November 19, 1980 who have failed to provide timely notification as required by section 3010(a) of RCRA and/or failed to file Part A of the permit application as required by 40 CFR 270.10 (e) and (g). These standards apply to all treatment, storage and disposal of hazardous waste at these facilities after the effective date of these regulations, except as specifically provided otherwise in this part or Part 261 of this chapter.

Comment: As stated in section 3005(a) of RCRA, after the effective date of regulations under that section (i.e., Parts 270 and 124 of this chapter), the treatment, storage and disposal of hazardous waste is prohibited except in accordance with a permit. Section 3005(e) of RCRA provides for the continued operation of an existing facility that meets certain conditions, until final administrative disposition of the owner's and operator's permit application is made.

(c) The requirements of this part do not apply to:

(1) A person disposing of hazardous waste by means of ocean disposal subject to a permit issued under the

HORITY: Secs. 1006, 2002(a), 3004, 3005
3015, Solid Waste Disposal Act, as
ded by the Resource Conservation and
ery Act, as amended (42 U.S.C. 6905,
a), 6924, 6925, and 6935).

RCE: 45 FR 33232, May 19, 1980, unless
wise noted.

TORIAL NOTE: The reporting or record-
ng provisions included in the final rule
shed at 47 FR 32274, July 26, 1982, will
bmitted for approval to the Office of

Management and Budget and will not become effective until OMB approval has been obtained. EPA will publish a notice in the FEDERAL REGISTER after it obtains OMB approval.

Subpart A—General

§ 265.1 Purpose, scope, and applicability.

(a) The purpose of this part is to establish minimum national standards that define the acceptable management of hazardous waste during the period of interim status and until certification of final closure or, if the facility is subject to post-closure requirements, until post-closure responsibilities are fulfilled.

(b) The standards of this part apply to owners and operators of facilities that treat, store or dispose of hazardous waste who have fully complied with the requirements for interim status under section 3005(e) of RCRA and § 270.10 of this chapter until either a permit is issued under section 3005 of RCRA or until applicable Part 265 closure and post-closure responsibilities are fulfilled, and to those owners and operators of facilities in existence on November 19, 1980 who have failed to provide timely notification as required by section 3010(a) of RCRA and/or failed to file Part A of the permit application as required by 40 CFR 270.10 (e) and (g). These standards apply to all treatment, storage and disposal of hazardous waste at these facilities after the effective date of these regulations, except as specifically provided otherwise in this part or Part 261 of this chapter.

Comment: As stated in section 3005(a) of RCRA, after the effective date of regulations under that section (i.e., Parts 270 and 124 of this chapter), the treatment, storage and disposal of hazardous waste is prohibited except in accordance with a permit. Section 3005(e) of RCRA provides for the continued operation of an existing facility that meets certain conditions, until final administrative disposition of the owner's and operator's permit application is made.

(c) The requirements of this part do not apply to:

(1) A person disposing of hazardous waste by means of ocean disposal subject to a permit issued under the Marine Protection, Research, and Sanctuaries Act;

[*Comment:* These Part 265 regulations do apply to the treatment or storage of hazardous waste before it is loaded onto an ocean vessel for incineration or disposal at sea, as provided in paragraph (b) of this section.]

(2) A person disposing of hazardous waste by means of underground injection subject to a permit issued under an Underground Injection Control (UIC) program approved or promulgated under the Safe Drinking Water Act;

[*Comment:* These Part 265 regulations do apply to the aboveground treatment or storage of hazardous waste before it is injected underground. These Part 265 regulations also apply to the disposal of hazardous waste by means of underground injection, as provided in paragraph (b) of this section, until final administrative disposition of a person's permit application is made under RCRA or under an approved or promulgated UIC program.]

(3) The owner or operator of a POTW which treats, stores, or disposes of hazardous waste;

[*Comment:* The owner or operator of a facility under paragraphs (c)(1) through (3) of this section is subject to the requirements of Part 264 of this chapter to the extent they are included in a permit by rule granted to such a person under Part 122 of this chapter, or are required by § 144.14 of this chapter.]

(4) A person who treats, stores, or disposes of hazardous waste in a State with a RCRA hazardous waste program authorized under Subpart A or B of Part 271 of this chapter, except that the requirements of this part will continue to apply:

(i) As stated in paragraph (c)(2) of this section, if the authorized State RCRA program does not cover disposal of hazardous waste by means of underground injection; or

(ii) To a person who treats, stores, or disposes of hazardous waste in a State authorized under Subpart A or B of Part 271 of this chapter if the State has not been authorized to carry out the requirements and prohibitions applicable to the treatment, storage, or disposal of hazardous waste at his facility which are imposed pursuant to the Hazardous and Solid Waste Act Amendments of 1984. The requirements and prohibitions that are appli-

cable until a State receives authorization to carry them out include all Federal program requirements identified in § 271.1(j);

(5) The owner or operator of a facility permitted, licensed, or registered by a State to manage municipal or industrial solid waste, if the only hazardous waste the facility treats, stores, or disposes of is excluded from regulation under this part by § 261.5 of this chapter;

(6) The owner and operator of a facility managing recyclable materials described in § 261.6 (a) (2) and (3) of this chapter (except to the extent that requirements of this part are referred to in Subparts C, D, F, or G of Part 266 of this chapter).

(7) A generator accumulating waste on-site in compliance with § 262.34 of this chapter, except to the extent the requirements are included in § 262.34 of this chapter;

(8) A farmer disposing of waste pesticides from his own use in compliance with § 262.51 of this chapter; or

(9) The owner or operator of a totally enclosed treatment facility, as defined in § 260.10.

(10) The owner or operator of an elementary neutralization unit or a wastewater treatment unit as defined in § 260.10 of this chapter.

(11)(i) Except as provided in paragraph (c)(11)(ii) of this section, a person engaged in treatment or containment activities during immediate response to any of the following situations:

(A) A discharge of a hazardous waste;

(B) An imminent and substantial threat of a discharge of a hazardous waste;

(C) A discharge of a material which, when discharged, becomes a hazardous waste.

(ii) An owner or operator of a facility otherwise regulated by this part must comply with all applicable requirements of Subparts C and D.

(iii) Any person who is covered by paragraph (c)(11)(i) of this section and who continues or initiates hazardous waste treatment or containment activities after the immediate response is over is subject to all applicable requirements of this part and Parts 122 through 124 of this chapter for those activities.

(12) A transporter storing manifested shipments of hazardous waste in containers meeting the requirements of 40 CFR 262.30 at a transfer facility for a period of ten days or less.

(13) The addition of absorbent material to waste in a container (as defined in § 260.10 of this chapter) or the addition of waste to the absorbent material in a container provided that these actions occur at the time waste is first placed in the containers; and §§ 265.17(b), 265.171, and 265.172 are complied with.

(d) The following hazardous wastes must not be managed at facilities subject to regulation under this part.

(1) EPA Hazardous Waste Nos. FO20, FO21, FO22, FO23, FO26, or FO27 unless:

(i) The wastewater treatment sludge is generated in a surface impoundment as part of the plant's wastewater treatment system;

(ii) The waste is stored in tanks or containers;

(iii) The waste is stored or treated in waste piles that meet the requirements of § 264.250(c) as well as all other applicable requirements of Subpart L of this part;

(iv) The waste is burned in incinerators that are certified pursuant to the standards and procedures in § 265.352; or

(v) The waste is burned in facilities that thermally treat the waste in a device other than an incinerator and that are certified pursuant to the standards and procedures in § 265.383.

[45 FR 33232, May 19, 1980, as amended at 45 FR 76075, Nov. 17, 1980; 45 FR 86968, Dec. 31, 1980; 46 FR 27480, May 20, 1981; 47 FR 8306, Feb. 25, 1982; 48 FR 2511, Jan. 19, 1983; 48 FR 14295, Apr. 1, 1983; 49 FR 46095, Nov. 21, 1984; 50 FR 666, Jan. 4, 1985; 50 FR 2005, Jan. 14, 1985; 50 FR 28749, July 15, 1985]

§§ 265.2—265.3 [Reserved]

§ 265.4 Imminent hazard action.

Notwithstanding any other provisions of these regulations, enforcement actions may be brought pursuant to section 7003 of RCRA.

Subpart B—General Facility Standards

§ 265.10 Applicability

The regulations in this subpa apply to owners and operators of a hazardous waste facilities, except a § 265.1 provides otherwise.

§ 265.11 Identification number.

Every facility owner or operato must apply to EPA for an EPA ident fication number in accordance wit the EPA notification procedures (4 FR 12746).

§ 265.12 Required notices.

(a) The owner or operator of a facil ty that has arranged to receive ha ardous waste from a foreign sourc must notify the Regional Administra tor in writing at least four weeks in ad vance of the date of the waste is ex pected to arrive at the facility. Notic of subsequent shipments of the sam waste from the same foreign source i not required.

(b) Before transferring ownership o operation of a facility during its ope ating life, or of a disposal facilit during the post-closure care perio the owner or operator must notify th new owner or operator in writing c the requirements of this part and Pa 270 of this chapter. (Also see § 270.7 of this chapter.)

[*Comment:* An owner's or operator's failu to notify the new owner or operator of th requirements of this part in no way relieve the new owner or operator of his obligatio to comply with all applicable requirements

(Approved by the Office of Managemer and Budget under control number 205(0013)

[45 FR 33232, May 19, 1980, as amended a 48 FR 14295, Apr. 1, 1983; 50 FR 4514, Ja 31, 1985]

§ 265.13 General waste analysis.

(a)(1) Before an owner or operato treats, stores, or disposes of any ha ardous waste, he must obtain a de tailed chemical and physical analysi of a representative sample of th waste. At a minimum, this analysi must contain all the informatio which must be known to treat, stor

rough 124 of this chapter for those tivities.

12) A transporter storing manifest shipments of hazardous waste in ntainers meeting the requirements 40 CFR 262.30 at a transfer facility a period of ten days or less.

13) The addition of absorbent mate- l to waste in a container (as defined § 260.10 of this chapter) or the addi- n of waste to the absorbent materi- in a container provided that these ions occur at the time waste is first ced in the containers; and 265.17(b), 265.171, and 265.172 are nplied with.

i) The following hazardous wastes st not be managed at facilities sub- to regulation under this part.

) EPA Hazardous Waste Nos. 20, FO21, FO22, FO23, FO26, or 27 unless:

) The wastewater treatment sludge enerated in a surface impoundment art of the plant's wastewater treat- t system;

) The waste is stored in tanks or tainers;

i) The waste is stored or treated in e piles that meet the require- ts of § 264.250(c) as well as all r applicable requirements of Sub- L of this part;

) The waste is burned in incinera- s that are certified pursuant to standards and procedures in .352; or

The waste is burned in facilities thermally treat the waste in a e other than an incinerator and are certified pursuant to the dards and procedures in § 265.383.

R 33232, May 19, 1980, as amended at R 76075, Nov. 17, 1980; 45 FR 86968, 31, 1980; 46 FR 27480, May 20, 1981; 47 306, Feb. 25, 1982; 48 FR 2511, Jan. 19, 48 FR 14295, Apr. 1, 1983; 49 FR Nov. 21, 1984; 50 FR 666, Jan. 4, 1985; 2005, Jan. 14, 1985; 50 FR 28749, July 85]

.2—265.3 [Reserved]

Imminent hazard action.

withstanding any other provi- of these regulations, enforce- actions may be brought pursu- section 7003 of RCRA.

Subpart B—General Facility Standards

§ 265.10 Applicability

The regulations in this subpart apply to owners and operators of all hazardous waste facilities, except as § 265.1 provides otherwise.

§ 265.11 Identification number.

Every facility owner or operator must apply to EPA for an EPA identification number in accordance with the EPA notification procedures (45 FR 12746).

§ 265.12 Required notices.

(a) The owner or operator of a facility that has arranged to receive hazardous waste from a foreign source must notify the Regional Administrator in writing at least four weeks in advance of the date of the waste is expected to arrive at the facility. Notice of subsequent shipments of the same waste from the same foreign source is not required.

(b) Before transferring ownership or operation of a facility during its operating life, or of a disposal facility during the post-closure care period, the owner or operator must notify the new owner or operator in writing of the requirements of this part and Part 270 of this chapter. (Also see § 270.72 of this chapter.)

[*Comment:* An owner's or operator's failure to notify the new owner or operator of the requirements of this part in no way relieves the new owner or operator of his obligation to comply with all applicable requirements.]

(Approved by the Office of Management and Budget under control number 2050-0013)

[45 FR 33232, May 19, 1980, as amended at 48 FR 14295, Apr. 1, 1983; 50 FR 4514, Jan. 31, 1985]

§ 265.13 General waste analysis.

(a)(1) Before an owner or operator treats, stores, or disposes of any hazardous waste, he must obtain a detailed chemical and physical analysis of a representative sample of the waste. At a minimum, this analysis must contain all the information which must be known to treat, store, or dispose of the waste in accordance with the requirements of this part.

(2) The analysis may include data developed under Part 261 of this chapter, and existing published or documented data on the hazardous waste or on waste generated from similar processes.

[*Comment:* For example, the facility's record of analyses performed on the waste before the effective date of these regulations, or studies conducted on hazardous waste generated from processes similar to that which generated the waste to be managed at the facility, may be included in the data base required to comply with paragraph (a)(1) of this section. The owner or operator of an off-site facility may arrange for the generator of the hazardous waste to supply part or all of the information required by paragraph (a)(1) of this section. If the generator does not supply the information, and the owner or operator chooses to accept a hazardous waste, the owner or operator is responsible for obtaining the information required to comply with this section.]

(3) The analysis must be repeated as necessary to ensure that it is accurate and up to date. At a minimum, the analysis must be repeated:

(i) When the owner or operator is notified, or has reason to believe, that the process or operation generating the hazardous waste has changed; and

(ii) For off-site facilities, when the results of the inspection required in paragraph (a)(4) of this section indicate that the hazardous waste received at the facility does not match the waste designated on the accompanying manifest or shipping paper.

(4) The owner or operator of an off-site facility must inspect and, if necessary, analyze each hazardous waste movement received at the facility to determine whether it matches the identity of the waste specified on the accompanying manifest or shipping paper.

(b) The owner or operator must develop and follow a written waste analysis plan which describes the procedures which he will carry out to comply with paragraph (a) of this section. He must keep this plan at the facility. At a minimum, the plan must specify:

(1) The parameters for which each hazardous waste will be analyzed and

the rationale for the selection of these parameters (i.e., how analysis for these parameters will provide sufficient information on the waste's properties to comply with paragraph (a) of this section);

(2) The test methods which will be used to test for these parameters;

(3) The sampling method which will be used to obtain a representative sample of the waste to be analyzed. A representative sample may be obtained using either:

(i) One of the sampling methods described in Appendix I of Part 261 of this chapter; or

(ii) An equivalent sampling method.

[*Comment:* See § 260.20(c) of this chapter for related discussion.]

(4) The frequency with which the initial analysis of the waste will be reviewed or repeated to ensure that the analysis is accurate and up to date;

(5) For off-site facilities, the waste analyses that hazardous waste generators have agreed to supply; and

(6) Where applicable, the methods which will be used to meet the additional waste analysis requirements for specific waste management methods as specified in §§ 265.193, 265.225, 265.252, 265.273, 265.314, 265.345, 265.375, and 265.402.

(c) For off-site facilities, the waste analysis plan required in paragraph (b) of this section must also specify the procedures which will be used to inspect and, if necessary, analyze each movement of hazardous waste received at the facility to ensure that it matches the identity of the waste designated on the accompanying manifest or shipping paper. At a minimum, the plan must describe:

(1) The procedures which will be used to determine the identity of each movement of waste managed at the facility; and

(2) The sampling method which will be used to obtain a representative sample of the waste to be identified, if the identification method includes sampling.

(Approved by the Office of Management and Budget under control number 2050-0012)

[45 FR 33232, May 19, 1980, as amended at 50 FR 4514, Jan. 31, 1985; 50 FR 18374, Apr. 30, 1985]

§ 265.14 Security.

(a) The owner or operator must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of his facility, *unless:*

(1) Physical contact with the waste, structures, or equipment with the active portion of the facility will not injure unknowing or unauthorized persons or livestock which may enter the active portion of a facility, and

(2) Disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or livestock onto the active portion of a facility, will not cause a violation of the requirements of this part.

(b) Unless exempt under paragraphs (a)(1) and (2) of this section, a facility must have:

(1) A 24-hour surveillance system (e.g., television monitoring or surveillance by guards of facility personnel) which continuously monitors and controls entry onto the active portion of the facility; or

(2)(i) An artificial or natural barrier (e.g., a fence in good repair or a fence combined with a cliff), which completely surrounds the active portion of the facility; and

(ii) A means to control entry, at all times, through the gates or other entrances to the active portion of the facility (e.g., an attendant, television monitors, locked entrance, or controlled roadway access to the facility).

[*Comment:* The requirements of paragraph (b) of this section are satisfied if the facility or plant within which the active portion is located itself has a surveillance system, or a barrier and a means to control entry, which complies with the requirements of paragraph (b)(1) or (2) of this section.]

(c) Unless exempt under paragraphs (a)(1) and (a)(2) of this section, a sign with the legend, "Danger—Unauthorized Personnel Keep Out," must be posted at each entrance to the active portion of a facility, and at other locations, in sufficient numbers to be seen from any approach to this active portion. The legend must be written in English and in any other language predominant in the area surrounding the facility (e.g., facilities in counties bordering the Canadian province o Quebec must post signs in French; fa cilities in counties bordering Mexic must post signs in Spanish), and mus be legible from a distance of at leas 25 feet. Existing signs with a legen other than "Danger—Unauthorize Personnel Keep Out" may be used i the legend on the sign indicates tha only authorized personnel are allowe to enter the active portion, and tha entry onto the active portion can b dangerous.

[*Comment:* See § 265.117(b) for discussion o security requirements at disposal facilitie during the post-closure care period.]

§ 265.15 General inspection requirements.

(a) The owner or operator must in spect his facility for malfunctions an deterioration, operator errors, and dis charges which may be causing—o may lead to: (1) Release of hazardou waste constituents to the environmen or (2) a threat to human health. Th owner or operator must conduct thes inspections often enough to identif problems in time to correct then before they harm human health o the environment.

(b)(1) The owner or operator mus develop and follow a written schedul for inspecting all monitoring equip ment, safety and emergency equip ment, security devices, and operatin and structural equipment (such a dikes and sump pumps) that are im portant to preventing, detecting, or re sponding to environmental or huma health hazards.

(2) He must keep this schedule a the facility.

(3) The schedule must identify th types of problems (e.g., malfunction or deterioration) which are to b looked for during the inspection (e.g. inoperative sump pump, leaking fit ting, eroding dike, etc.).

(4) The frequency of inspection ma vary for the items on the schedule However, it should be based on th rate of possible deterioration of th equipment and the probability of a environmental or human health inci dent if the deterioration or malfunc tion or any operator error goes unde tected between inspections. Areas sub ject to spills, such as loading and un loading areas, must be inspected dail

nment: See §§ 265.119, 265.279, and 09 for related requirements.]

) Records and results of waste yses and trial tests performed as ified in §§ 265.13, 265.193, 265.225, 252, 265.273, 265.314, 265.341, 375, and 265.402;

) Summary reports and details of ncidents that require implement- the contingency plan as specified 265.56(j);

Records and results of inspec- as required by § 265.15(d) (except e data need be kept only three s);

Monitoring, testing, or analytical where required by §§ 265.90, 4, 265.276, 265.278, 265.280(d)(1), 47, and 265.377; and,

nment: As required by § 265.94, monitor- ata at disposal facilities must be kept ghout the post-closure period.]

All closure cost estimates under .142 and, for disposal facilities, all closure cost estimates under .144.

oved by the Office of Management Budget under control number 2050-

R 33232, May 19, 1980, as amended at 7680, Jan. 23, 1981; 50 FR 4514, Jan. 35; 50 FR 18374, Apr. 30, 1985]

4 Availability, retention, and dispo- ion of records.

All records, including plans, re- d under this part must be fur- d upon request, and made avail- t all reasonable times for inspec- by any officer, employee, or rep- ative of EPA who is duly desig- by the Administrator.

The retention period for all s required under this part is ex- d automatically during the of any unresolved enforcement regarding the facility or as re- d by the Administrator.

A copy of records of waste dispos- cations and quantities under 3(b)(2) must be submitted to egional Administrator and local uthority upon closure of the fa- see § 265.119).

ved by the Office of Management udget under control number 2050-

[45 FR 33232, May 19, 1980, as amended at 50 FR 4514, Jan. 31, 1985]

§ 265.75 Biennial report.

The owner or operator must prepare and submit a single copy of a biennial report to the Regional Administrator by March 1 of each even numbered year. The biennial report must be submitted on EPA Form 8700-13B. The report must cover facility activities during the previous calendar year and must include the following information:

(a) The EPA identification number, name, and address of the facility;

(b) The calendar year covered by the report;

(c) For off-site facilities, the EPA identification number of each hazardous waste generator from which the facility received a hazardous waste during the year; for imported shipments, the report must give the name and address of the foreign generator;

(d) A description and the quantity of each hazardous waste the facility received during the year. For off-site facilities, this information must be listed by EPA identification number of each generator;

(e) The method of treatment, storage, or disposal for each hazardous waste;

(f) Monitoring data under § 265.94(a)(2)(ii) and (iii), and (b)(2), where required;

(g) The most recent closure cost estimate under § 265.142, and, for disposal facilities, the most recent post-closure cost estimate under § 265.144; and

(h) The certification signed by the owner or operator of the facility or his authorized representative.

(Approved by the Office of Management and Budget under control number 2050-0024)

[45 FR 33232, May 19, 1980, as amended at 48 FR 3982, Jan. 28, 1983; 50 FR 4514, Jan. 31, 1985]

§ 265.76 Unmanifested waste report.

If a facility accepts for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest, or without an accompanying shipping paper as described in § 263.20(e)(2) of this chapter, and if the waste is not excluded from the manifest requirement by § 261.5 of this chapter, then the owner or operator must prepare and submit a single copy of a report to the Regional Administrator within fifteen days after receiving the waste. The unmanifested waste report must be submitted on EPA form 8700-13B. Such report must be designated 'Unmanifested Waste Report' and include the following information:

(a) The EPA identification number, name, and address of the facility;

(b) The date the facility received the waste;

(c) The EPA identification number, name, and address of the generator and the transporter, if available;

(d) A description and the quantity of each unmanifested hazardous waste the facility received;

(e) The method of treatment, storage, or disposal for each hazardous waste;

(f) The certification signed by the owner or operator of the facility or his authorized representative; and

(g) A brief explanation of why the waste was unmanifested, if known.

[*Comment:* Small quantities of hazardous waste are excluded from regulation under this part and do not require a manifest. Where a facility receives unmanifested hazardous wastes, the Agency suggests that the owner or operator obtain from each generator a certification that the waste qualifies for exclusion. Otherwise, the Agency suggests that the owner or operator file an unmanifested waste report for the hazardous waste movement.]

(Approved by the Office of Management and Budget under control number 2050-0013)

[45 FR 33232, May 19, 1980, as amended at 48 FR 3982, Jan. 28, 1983; 50 FR 4514, Jan. 31, 1985]

§ 265.77 Additional reports.

In addition to submitting the biennial report and unmanifested waste reports described in §§ 265.75 and 265.76, the owner or operator must also report to the Regional Administrator:

(a) Releases, fires, and explosions as specified in § 265.56(j);

(b) Ground-water contamination and monitoring data as specified in §§ 265.93 and 265.94; and

N of this part during the post-closure care period; and

(2) A description of the planned maintenance activities, and frequencies at which they will be performed, to ensure:

(i) The integrity of the cap and final cover or other containment systems in accordance with the requirements of Subparts K, L, M, and N of this part; and

(ii) The function of the monitoring equipment in accordance with the requirements of Subparts F, K, L, M, and N of this part; and

(3) The name, address, and phone number of the person or office to contact about the hazardous waste disposal unit or facility during the post-closure care period.

(d) *Amendment of plan.* The owner or operator may amend the post-closure plan any time during the active life of the facility or during the post-closure care period. An owner or operator with an approved post-closure plan must submit a written request to the Regional Administrator to authorize a change to the approved plan. The written request must include a copy of the amended post-closure plan for approval by the Regional Administrator.

(1) The owner or operator must amend the post-closure plan whenever:

(i) Changes in operating plans or facility design affect the post-closure plan, or

(ii) Events which occur during the active life of the facility, including partial and final closures, affect the post-closure plan.

(2) The owner or operator must amend the post-closure plan at least 60 days prior to the proposed change in facility design or operation, or no later than 60 days after an unexpected event has occurred which has affected the post-closure plan.

(3) An owner or operator with an approved post-closure plan must submit the modified plan to the Regional Administrator at least 60 days prior to the proposed change in facility design or operation, or no more than 60 days after an unexpected event has occurred which has affected the post-closure plan. If an owner or operator of a surface impoundment or a waste pile who intended to remove all hazardous wastes at closure in accordance with § 265.228(b) or § 265.258(a) is required to close as a landfill in accordance with § 265.310, the owner or operator must submit a post-closure plan within 90 days of the determination by the owner or operator or Regional Administrator that the unit must be closed as a landfill. If the amendment to the post-closure plan is a major modification according to the criteria in §§ 270.41 and 270.42, the modification to the plan will be approved according to the procedures in § 265.118(f).

(4) The Regional Administrator may request modifications to the plan under the conditions described in paragraph (d)(1) of this section. An owner or operator with an approved post-closure plan must submit the modified plan no later than 60 days of the request from the Regional Administrator. If the amendment to the plan is considered a major modification according to the criteria in §§ 270.41 and 270.42, the modifications to the post-closure plan will be approved in accordance with the procedures in § 265.118(f). If the Regional Administrator determines that an owner or operator of a surface impoundment or waste pile who intended to remove all hazardous wastes at closure must close the facility as a landfill, the owner or operator must submit a post-closure plan for approval to the Regional Administrator within 90 days of the determination.

(e) The owner or operator of a facility with hazardous waste management units subject to these requirements must submit his post-closure plan to the Regional Administrator at least 180 days before the date he expects to begin partial or final closure of the first hazardous waste disposal unit. The date he "expects to begin closure" of the first hazardous waste disposal unit must be either within 30 days after the date on which the hazardous waste management unit receives the known final volume of hazardous waste or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous wastes. The owner or operator must submit the post-closure plan to the Regional Administrator no later than 15 days after:

(1) Termination of interim status (except when a permit is issued to the facility simultaneously with termination of interim status); or

(2) Issuance of a judicial decree or final orders under section 3008 of RCRA to cease receiving wastes or close.

(f) The Regional Administrator will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the post-closure plan and request modifications to the plan no later than 30 days from the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a post-closure plan. The Regional Administrator will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The Regional Administrator will approve, modify, or disapprove the plan within 90 days of its receipt. If the Regional Administrator does not approve the plan he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The Regional Administrator will approve or modify this plan in writing within 60 days. If the Regional Administrator modifies the plan, this modified plan becomes the approved post-closure plan. The Regional Administrator must ensure that the approved post-closure plan is consistent with §§ 265.117 through 265.120. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(g) The post-closure plan and length of the post-closure care period may be modified any time prior to the end

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who intended to remove all hazardous wastes at closure in accordance with § 265.228(b) or § 265.258(a) is required to close as a landfill in accordance with § 265.310, the owner or operator must submit a post-closure plan within 90 days of the determination by the owner or operator or Regional Administrator that the unit must be closed as a landfill. If the amendment to the post-closure plan is a major modification according to the criteria in §§ 270.41 and 270.42, the modification to the plan will be approved according to the procedures in § 265.118(f).

(4) The Regional Administrator may request modifications to the plan under the conditions described in paragraph (d)(1) of this section. An owner or operator with an approved post-closure plan must submit the modified plan no later than 60 days of the request from the Regional Administrator. If the amendment to the plan is considered a major modification according to the criteria in §§ 270.41 and 270.42, the modifications to the post-closure plan will be approved in accordance with the procedures in 265.118(f). If the Regional Administrator determines that an owner or operator of a surface impoundment or waste pile who intended to remove all hazardous wastes at closure must close the facility as a landfill, the owner or operator must submit a post-closure plan for approval to the Regional Administrator within 90 days of the determination.

(e) The owner or operator of a facility with hazardous waste management units subject to these requirements must submit his post-closure plan to the Regional Administrator at least 180 days before the date he expects to begin partial or final closure of the first hazardous waste disposal unit. The date he "expects to begin closure" of the first hazardous waste disposal unit must be either within 30 days after the date on which the hazardous waste management unit receives the known final volume of hazardous waste or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of

hazardous wastes. The owner or operator must submit the post-closure plan to the Regional Administrator no later than 15 days after:

(1) Termination of interim status (except when a permit is issued to the facility simultaneously with termination of interim status); or

(2) Issuance of a judicial decree or final orders under section 3008 of RCRA to cease receiving wastes or close.

(f) The Regional Administrator will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the post-closure plan and request modifications to the plan no later than 30 days from the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a post-closure plan. The Regional Administrator will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The Regional Administrator will approve, modify, or disapprove the plan within 90 days of its receipt. If the Regional Administrator does not approve the plan he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The Regional Administrator will approve or modify this plan in writing within 60 days. If the Regional Administrator modifies the plan, this modified plan becomes the approved post-closure plan. The Regional Administrator must ensure that the approved post-closure plan is consistent with §§ 265.117 through 265.120. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(g) The post-closure plan and length of the post-closure care period may be modified any time prior to the end of the post-closure care period in either of the following two ways:

(1) The owner or operator or any member of the public may petition the Regional Administrator to extend or reduce the post-closure care period applicable to a hazardous waste management unit or facility based on cause, or alter the requirements of the post-closure care period based on cause.

(i) The petition must include evidence demonstrating that:

(A) The secure nature of the hazardous waste management unit or facility makes the post-closure care requirement(s) unnecessary or supports reduction of the post-closure care period specified in the current post-closure plan (e.g., leachate or ground-water monitoring results, characteristics of the wastes, application of advanced technology, or alternative disposal, treatment, or re-use techniques indicate that the facility is secure), or

(B) The requested extension in the post-closure care period or alteration of post-closure care requirements is necessary to prevent threats to human health and the environment (e.g., leachate or ground-water monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health and the environment).

(ii) These petitions will be considered by the Regional Administrator only when they present new and relevant information not previously considered by the Regional Administrator. Whenever the Regional Administrator is considering a petition, he will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments within 30 days of the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever a hearing might clarify one or more issues concerning the post-closure plan. The Regional Administrator will give the public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for written public comments, and the two notices may be combined.) After considering the comments, he

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ble wastes or materials if containers break or leak.]

Subpart J—Tanks

§ 265.190 Applicability.

The regulations in this subpart apply to owners and operators of facilities that use tanks to treat or store hazardous waste, except as § 265.1 provides otherwise.

§ 265.191 [Reserved]

§ 265.192 General operating requirements.

(a) Treatment or storage of hazardous waste in tanks must comply with § 265.17(b).

(b) Hazardous wastes or treatment reagents must not be placed in a tank if they could cause the tank or its inner liner to rupture, leak, corrode, or otherwise fail before the end of its intended life.

(c) Uncovered tanks must be operated to ensure at least 60 centimeters (2 feet) of freeboard, *unless* the tank is equipped with a containment structure (e.g., dike or trench), a drainage control system, or a diversion structure (e.g., standby tank) with a capacity that equals or exceeds the volume of the top 60 centimeters (2 feet) of the tank.

(d) Where hazardous waste is continuously fed into a tank, the tank must be equipped with a means to stop this inflow (e.g., a waste feed cutoff system or by-pass system to a stand-by tank).

[*Comment:* These systems are intended to be used in the event of a leak or overflow from the tank due to a system failure (e.g., a malfunction in the treatment process, a crack in the tank, etc.).]

§ 265.193 Waste analysis and trial tests.

(a) In addition to the waste analysis required by § 265.13, whenever a tank is to be used to:

(1) Chemically treat or store a hazardous waste which is substantially different from waste previously treated or stored in that tank; or

(2) Chemically treat hazardous waste with a substantially different process than any previously used in that tank; the owner or operator must, before treating or storing the different waste or using the different process:

(i) Conduct waste analyses and trial treatment or storage tests (e.g., bench scale or pilot plant scale tests); or

(ii) Obtain written, documented information on similar storage or treatment of similar waste under similar operating conditions;

to show that this proposed treatment or storage will meet all applicable requirements of § 265.192(a) and (b).

[*Comment:* As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.198 and 265.199. As required by § 265.73, the owner or operator must place the results from each waste analysis and trial test, or the documented information, in the operating record of the facility.]

§ 265.194 Inspections.

(a) The owner or operator of a tank must inspect, where present:

(1) Discharge control equipment (e.g., waste feed cut-off systems, by-pass systems, and drainage systems), at least once each operating day, to ensure that it is in good working order;

(2) Data gathered from monitoring equipment (e.g., pressure and temperature gauges), at least once each operating day, to ensure that the tank is being operated according to its design;

(3) The level of waste in the tank, at least once each operating day, to ensure compliance with § 265.192(c);

(4) The construction materials of the tank, at least weekly, to detect corrosion or leaking of fixtures or seams; and

(5) The construction materials of, and the area immediately surrounding, discharge confinement structures (e.g., dikes), at least weekly, to detect erosion or obvious signs of leakage (e.g., wet spots or dead vegetation).

[*Comment:* As required by § 265.15(c), the owner or operator must remedy any deterioration or malfunction he finds.]

§§ 265.195—265.196 [Reserved]

§ 265.197 Closure.

At closure, all hazardous waste and hazardous waste residues must be removed from tanks, discharge control equipment, and discharge confinement structures.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3(c) or (d) of this chapter, that any solid waste removed from his tank is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this chapter.]

§ 265.198 Special requirements for ignitable or reactive waste.

(a) Ignitable or reactive waste must not be placed in a tank, unless:

(1) The waste is treated, rendered, or mixed before or immediately after placement in the tank so that (i) the resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under § 261.21 or § 261.23 of this chapter, and (ii) § 265.17(b) is complied with; or

(2) The waste is stored or treated in such a way that it is protected from any material or conditions which may cause the waste to ignite or react; or

(3) The tank is used solely for emergencies.

(b) The owner or operator of a facility which treats or stores ignitable or reactive waste in covered tanks must comply with the buffer zone requirements for tanks contained in Tables 2-1 through 2-6 of the National Fire Protection Association's "Flammable and Combustible Liquids Code" (1977 or 1981), (incorporated by reference, see § 260.11).

[45 FR 33232, May 19, 1980, as amended at 46 FR 35249, July 7, 1981]

§ 265.199 Special requirements for incompatible wastes.

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same tank, unless § 265.17(b) is complied with.

(b) Hazardous waste must not be placed in an unwashed tank which previously held an incompatible waste or material, unless § 265.17(b) is complied with.

before treating or storing the different waste or using the different process:

(i) Conduct waste analyses and trial treatment or storage tests (e.g., bench scale or pilot plant scale tests); or

(ii) Obtain written, documented information on similar storage or treatment of similar waste under similar operating conditions;

to show that this proposed treatment or storage will meet all applicable requirements of § 265.192(a) and (b).

[*Comment:* As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.198 and 265.199. As required by § 265.73, the owner or operator must place the results from each waste analysis and trial test, or the documented information, in the operating record of the facility.]

§ 265.194 Inspections.

(a) The owner or operator of a tank must inspect, where present:

(1) Discharge control equipment (e.g., waste feed cut-off systems, bypass systems, and drainage systems), at least once each operating day, to ensure that it is in good working order;

(2) Data gathered from monitoring equipment (e.g., pressure and temperature gauges), at least once each operating day, to ensure that the tank is being operated according to its design;

(3) The level of waste in the tank, at least once each operating day, to ensure compliance with § 265.192(c);

(4) The construction materials of the tank, at least weekly, to detect corrosion or leaking of fixtures or seams; and

(5) The construction materials of, and the area immediately surrounding, discharge confinement structures (e.g., dikes), at least weekly, to detect erosion or obvious signs of leakage (e.g., wet spots or dead vegetation).

[*Comment:* As required by § 265.15(c), the owner or operator must remedy any deterioration or malfunction he finds.]

§§ 265.195—265.196 [Reserved]

§ 265.197 Closure.

At closure, all hazardous waste and hazardous waste residues must be removed from tanks, discharge control equipment, and discharge confinement structures.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3(c) or (d) of this chapter, that any solid waste removed from his tank is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this chapter.]

§ 265.198 Special requirements for ignitable or reactive waste.

(a) Ignitable or reactive waste must not be placed in a tank, unless:

(1) The waste is treated, rendered, or mixed before or immediately after placement in the tank so that (i) the resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under § 261.21 or § 261.23 of this chapter, and (ii) § 265.17(b) is complied with; or

(2) The waste is stored or treated in such a way that it is protected from any material or conditions which may cause the waste to ignite or react; or

(3) The tank is used solely for emergencies.

(b) The owner or operator of a facility which treats or stores ignitable or reactive waste in covered tanks must comply with the buffer zone requirements for tanks contained in Tables 2-1 through 2-6 of the National Fire Protection Association's "Flammable and Combustible Liquids Code" (1977 or 1981), (incorporated by reference, see § 260.11).

[45 FR 33232, May 19, 1980, as amended at 46 FR 35249, July 7, 1981]

§ 265.199 Special requirements for incompatible wastes.

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same tank, unless § 265.17(b) is complied with.

(b) Hazardous waste must not be placed in an unwashed tank which previously held an incompatible waste or material, unless § 265.17(b) is complied with.

Subpart K—Surface Impoundments

§ 265.220 Applicability.

The regulations in this subpart apply to owners and operators of facilities that use surface impoundments to treat, store, or dispose of hazardous waste, except as § 265.1 provides otherwise.

§ 265.221 Design requirements.

(a) The owner or operator of a surface impoundment must install two or more liners and leachate collection system in accordance with § 264.221(c) of this chapter, with respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the area identified in the Part A permit application, and with respect to waste received beginning May 8, 1985.

(b) The owner or operator of each unit referred to in paragraph (a) of this section must notify the Regional Administrator at least sixty days prior to receiving waste. The owner or operator of each facility submitting notice must file a Part B application within six months of the receipt of such notice.

(c) Paragraph (a) of this section will not apply if the owner or operator demonstrates to the Regional Administrator, and the Regional Administrator finds for such surface impoundment, that alternative design and operating practices, together with location characteristics, will prevent the migration of any hazardous constituent into the ground water or surface water at least as effectively as such liners and leachate collection systems.

(d) The double liner requirement set forth in paragraph (a) of this section may be waived by the Regional Administrator for any monofill, if:

(1) The monofill contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, and such wastes do not contain constituents which would render the wastes hazardous for reasons other than the EP toxicity characteristics in § 261.24 of this chapter; and

(2)(i)(A) The monofill has at least one liner for which there is no evi-